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DECISIONS

P. S. P.

OF

THE DEPARTMENT OF THE INTERIOR

AND

GENERAL LAND OFFICE

IN

CASES RELATING TO THE PUBLIC LANDS

FROM JULY 1, 1893, TO DECEMBER 31, 1893.

VOLUME XVII.

Edited by S. V. PROUDFIT.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.

1894.

DEPARTMENT OF THE INTERIOR,
Washington, D. C.

This publication is held for sale by the Department at cost price, as follows:

Volume 1, from July, 1881, to June, 1883	\$1. 05
Volume 2, from July, 1883, to June, 1884	1. 15
Volume 3, from July, 1884, to June, 1885	1. 07
Volume 4, from July, 1885, to June, 1886	1. 15
Volume 5, from July, 1886, to June, 1887	1. 05
Volume 6, from July, 1887, to June, 1888	1. 45
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Volume 16, from January 1, 1893, to June 30, 1893	1. 05
Volume 17, from July, 1893, to December, 1893	1. 05
Digest, volumes 1 to 16, inclusive	1. 15

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DECISIONS
RELATING TO
THE PUBLIC LANDS.

SETTLEMENT CLAIM—RESIDENCE.

PAULSEN *v.* ELLINGWOOD.

The good faith of a settlement claim is not impeached by absences from the land to earn money for the support of the family and the purchase of the land.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 6, 1893.

On February 16, 1889, John N. Ellingwood filed his pre-emption declaratory statement (No. 13,575) for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 32, T. 24 N., R. 5 E., at Seattle land office, Washington.

On October 3, 1889, he gave notice of his intention to make final proof in support of his claim, before the local officers, on December 20, 1889, when his final proof was submitted.

On November 19, 1889, Julius C. Paulsen filed a protest against the allowance of said final proof, alleging—

That the said Ellingwood is a married man, and that neither he nor his wife have lived continuously on said land for the space of six months last past; that said Ellingwood has not made any valuable improvements on said land; that said Ellingwood has not cleared any of said land so as to fit it for cultivation; that while there is a house on said land, said Ellingwood did not put it there, but that it was on the land when he filed thereon; that affiant believes that said Ellingwood is at present living in said city of Seattle.

A hearing was ordered for May 14, 1890, when the parties appeared and submitted testimony.

On July 28, 1890, the local officers rendered their opinion as follows:

It appears that Ellingwood improved the land included in his pre-emption by erecting a good substantial log house of a value of \$150.00, partially cleared five acres and built a road thereto, all of a probable value of about \$500.00.

That he is a poor man and has been unable by reason of his poverty to bring his family to Washington; that he was compelled by reason of his poverty to work at his trade of carpentering in the city of Seattle, distant about eight miles from the land, to support his family, secure means for a livelihood and to carry on the improvements on the place; that notwithstanding this, he was on the place improving it nearly every Saturday and Sunday and often at other times.

We are therefore fully satisfied of the bona fides of the claimant and therefore recommend that his proof be accepted and the protest be dismissed.

On appeal, by letter of May 27, 1892, you reversed the action of the local officers, rejected Ellingwood's final proof, and held his declaratory statement for cancellation.

An appeal now brings the case to this Department.

The evidence in this case is conflicting, and upon some points irreconcilable. The trial was had before the local officers, before whom the witnesses personally appeared. The facts are somewhat unusual, and it seems to be a case where "much must depend on the surrounding circumstances, and the character and conduct of the witnesses at the trial." *Tyler v. Emde* (12 L. D., 94). In that case it is said—

It is a familiar doctrine in the Department that the local officers, before whom the witnesses personally appear, have the advantage over all appellate tribunals from their opportunity to observe the appearance and bearing of the witnesses, their manner in giving their testimony, etc., and for these reasons the Department looks with great respect on the conclusions of the local officers as to matters of fact.

This is peculiarly a case for the application of this doctrine, because so much must depend upon which side in the controversy lies the truth.

The land in dispute lies within about eight miles from the land office, and the question related largely to the good faith of the claimant, which depended in a great measure upon the difficulties which surrounded him, and which were to a considerable extent allied to the situation and locality, and would be better understood and appreciated by those upon the ground than they can be here.

It appears that the claimant left his family in Boston Massachusetts, and went to California, where he lost nearly all of his means in unfortunate investments. He then went to Seattle, Washington, where he arrived with about \$250.00 in cash—the remnant of his property. With this he bought the possessory right and improvements of one Loftus to and upon the land in dispute, who relinquished his claim thereto February 16, 1889. These improvements consisted of a substantial log house sixteen by twenty feet, a well about ten feet deep, and about an acre surrounding the house partially cleared of timber. After the purchase, on February 17, 1889, he moved on the land with provisions sufficient to last him several weeks. He then proceeded, with the assistance of others, to increase the clearing to about five acres, deepened the well to fifteen feet, cleared a place for an orchard, and opened a road from his claim to the main road about three-fourths of a mile distant.

Ellingwood was a carpenter, and after his provisions were exhausted he went to Seattle and obtained work at his trade to earn means to support himself and his family in Boston, Massachusetts, who consisted of a wife and two children. He lived on his claim during all the leisure time he could spare from his work, averaging about two days in a week. He had in his house, bed, bedding, furniture, provisions, clothing, axe, cross-cut saw, and his tools, except what he used in his trade at Seattle. He estimated the value of his improvements as follows—house, \$150, well, \$10, five acres of clearing, \$300, road, \$100, total, \$560. He testified that he had no other home, that he wanted the claim as a permanent home for himself and family, and that it was his intention to send for his family to occupy the premises as soon as he got title to the land, and could earn money enough to send for them.

The claimant seems to be an honest, industrious man, and there was no question made that he did not work at his trade as he testified, while absent from his claim. The sole question, therefore, is whether these absences, for the purpose specified, in view of all the circumstances of the case, impeach his good faith.

In *Logan v. Gunn* (13 L. D., 113, 115), it was held that—"Temporary absences on business or on account of the poverty of the party do not interrupt the continuity of residence where the same has been actually acquired." See also *Richard L. Williams* (13 L. D., 42); *Montgomery v. Curl* (9 L. D., 57). In the case of *Lewis H. Pennell* (8 L. D., 645), which is similar to the present one in its important particulars, the final proof of the pre-emptor was accepted.

In the case of *Israel Martel* (6 L. D., 566), the principle which seems applicable to the present case, is announced as follows—

The rule requiring actual residence of the claimant on the land for six months preceding entry, is for the purpose of testing the good faith of the claimant; but where the good faith of the settler is otherwise sufficiently established, temporary absences during any period of the settlement for the purpose of earning a living not inconsistent with an honest intention to comply with the law, will be accounted a constructive residence.

I am of the opinion that, judged by this rule, the good faith of Ellingwood is not impeached by his absence from the land to earn money to support himself and family, and to enable him to pay for the land.

Your judgment is reversed.

PRACTICE—AFFIDAVIT OF CONTEST—EVIDENCE.

BUSHNELL v. EARL.

A defendant who appears in response to a citation and submits his testimony without objection to the affidavit of contest will not be subsequently heard to question its regularity.

Under rule 35 of practice a notary public may be properly designated to take testimony in contest cases.

The personal delivery by the officer of testimony so taken, instead of sealing and mailing the same as required by the rules of practice, does not preclude its consideration, in the absence of a showing that any rights have been prejudiced thereby.

A party that fails to appear on the day fixed for hearing will not be permitted to plead want of notice of adjourned proceedings.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 6, 1893.

Sarah Earl has appealed from your decision of July 8, 1892, holding for cancellation her homestead entry for lot 1 and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 19, T. 24 S., R. 10 E., M. D. M., San Francisco, California, upon the contest of Edwin D. Bushnell.

The contest was initiated January 25, 1890, by filing in the local office an affidavit, made before a notary public, of Monterey county, California, charging: non-residence on the land, abandonment, lack of good faith, lack of cultivation, and claim of residence elsewhere for more than six months.

Notice was duly issued by the register, citing the parties to appear and offer their testimony before F. J. Alexander, notary public, on March 18, 1890, hearing to be had at the local office, to consider the testimony, on the 25th of the same month. All the parties appeared and submitted their testimony before said notary, without objection from either side. This testimony, after being duly signed and certified, was delivered in person by the notary taking the same to the local officers.

It appears that on March 25, 1890, the day set for the hearing at the local office, the office of register was vacant, and for this reason the hearing was postponed, but not to a day fixed, and it was not until December 12, 1890, that the local officers rendered their decision recommending the entry for cancellation.

The defendant's attorneys did not appear on March 25th, the day set for the hearing, and were never notified of the deferred hearing. They now complain that the proceedings were irregular and illegal from the start, because: 1st, The affidavit of contest was sworn to before a notary public, and for that reason the contest should have been dismissed.

This objection can not be sustained, because they appeared in obedi-

ence to a summons from the register based on said affidavit, and entered into the trial before the duly commissioned notary, without protest or objection to the affidavit. Having so appeared and submitted their testimony, this defendant must be considered as having waived any irregularity in the process or method by which she was brought into court.

2d, It is insisted that there is no authority in law for a notary public to hear the testimony.

The manner of conducting these investigations is not pointed out by statute, but left to the Commissioner of the General Land Office, with the approval of this Department, to make rules and regulations for the conduct of the same.

Rule 35 of the Rules of Practice says that testimony in contest cases may be taken "in the discretion of registers and receivers" before a United States commissioner or other officer authorized to administer oaths.

By numerous decisions of this Department a notary public is held to be one of such "other officers," and the history of these litigations shows that notaries-public are frequently designated to take such testimony when the witnesses are not convenient to the local office.

The third contention is that there was substantial error on the part of the local officers in hearing the case at a day different from that specified in the summons, without notifying the claimant of the day subsequently fixed for such hearing.

This objection can not be sustained. The original notice informed the claimant that the hearing would be had on the 25th of March, 1890, and it appears from the record that the claimant did not appear on that day, either in person or by attorney. The notice was regular and cited her to appear upon that day.

If she desired to be heard at such hearing, it was her duty to appear, and, although the hearing could not have been had at that time owing to the vacancy in the office of register, yet the receiver was authorized to adjourn the hearing from time to time until the vacancy could be filled and the case considered. By thus appearing she could have been informed as to the day of hearing.

The original summons brought her into court, and in contemplation of law she was thenceforward properly in court for all purposes, and charged with notice of all proceedings in connection with the case on trial.

But, aside from this, there seems to be no real merit in the objection, because it is not shown that the claimant has lost any right by her failure to be present at the hearing. The evidence was all taken before the notary public, and it only remained for the register and receiver to consider such evidence on the day set for the hearing and render their decision thereon. If it was shown here that claimant had any substantial reason for being present thereat, such as asking to be allowed to

introduce other important material evidence that would probably change the judgment, with a proper excuse for not having submitted it before the notary, in the exercise of my supervisory authority, I might properly allow a rehearing for that purpose. But no such showing is made, and I am asked to set aside the judgment and proceedings, and dismiss the contest, upon the technical grounds above stated.

The claim that your judgment should be arrested, because the notary personally delivered the testimony to the local officers, instead of sealing and mailing it, as contemplated by the rules of practice, is without merit for the same reason—namely, it is not shown that any of the rights of claimant were prejudiced thereby. The evidence reached the office without alteration; it was duly considered and judgment rendered thereon, and I shall not disturb it for the sole reason that the record was received from the hands of the notary, instead of the postmaster.

The testimony has been examined, and in my opinion clearly sustains your judgment.

There was a motion made before your office to consolidate this case with that of *C. R. Bushnell v. William L. Earl*, which motion does not seem to have been acted upon by your predecessor. It is hereby overruled.

The judgment appealed from is affirmed.

RAILROAD GRANT—ADJUSTMENT.

FLORIDA CENTRAL AND PENINSULAR R. R. Co.

(ON REVIEW.)

The right to the grant conveyed by the act of May 17, 1856, has not been forfeited by any act of the Florida R. R. Co. or its successors, and the State has by no act of its legislature denied to said company the benefits of said grant, and it is therefore the duty of the Department to adjust said grant in accordance with the provisions of said act.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

A motion has been filed by the Hon. Wilkinson Call, asking that the action of the Department, on February 15, 1893, approving certain lists of lands to the State of Florida on account of the grant made to said State to aid in the construction of a railroad "from Amelia Island on the Atlantic to the waters of Tampa Bay, with a branch to Cedar Keys on the Gulf of Mexico," by the act of May 17, 1856, be revoked and set aside.

I thereupon directed that action upon said approved lists be suspended until I could examine into the matter complained of. I have since heard oral argument in support of said motion, and after a full

and careful consideration of the whole question, I see no reason to revoke the action of my predecessor.

I have also examined carefully every act passed by the State of Florida to which attention was called in the argument on said motion, and, in my judgment, most of the acts referred to have no application to the issues involved in this controversy. Upon an examination of the acts of the legislature of Florida that bear upon this question, I do not find that any declaration has been made by said State that the company was not entitled to the benefits of the grant of May 17, 1856, nor that any action was taken by said State attempting in any manner to impair the rights of the road thereunder, which became vested upon the filing of its map of definite location in 1857.

By reference to the several decisions made by this Department upon the issues now involved, it will be seen that the right of this road to the grant under the act of May 17, 1856, has never been questioned. Secretary Chandler, in his decision of April 29, 1876, refused to allow the company to file a map of definite location of the road after the expiration of the time within which, by the terms of the grant, the road was required to be completed. But when the question came before Secretary Schurz, it was upon the application of the company to file a copy of the original map of definite location, made in 1857, and filed with the Commissioner of the General Land Office, which was allowed on January 28, 1881. His decision was affirmed by Secretary Teller in his decision of January 30, 1884 (2 L. D., 561); by Secretary Lamar on August 30, 1886 (5 L. D., 107); and by Secretary Noble on March 2, 1893 (16 L. D., 217)—all holding that the right to the grant conveyed by the act of May 17, 1856, has not been forfeited by any act of the Florida Railroad Company or its successors, and that the State of Florida has by no act of its legislature denied to said company the benefits of said grant, but has through its executive recognized the rights of said company thereunder, and that it is therefore the duty of the Department to adjust the grant in accordance with the provisions of said act. Every question presented by Senator Call in the argument upon this motion appears to have been fully considered and passed upon by my predecessors; and the several acts which he refers to and cites in support of his position that no location was ever made within the lifetime of the grant, and that no grant of this land was ever made by the State to the Florida Railroad Company, and that the State of Florida by continuous legislation since 1866 has repeatedly denied to the Florida Railroad Company any of the benefits of this grant, were fully considered by my predecessors in their several decisions, and a contrary conclusion reached.

No additional fact has been submitted, nor any law referred to, that was not considered by the Department in the decisions heretofore rendered; and, as I find no error in the conclusion reached, I must deny the motion, and direct that the order of April 10, 1893, suspending the approval of said lists, be revoked.

SOUTH OKLAHOMA *v.* COUCH ET AL.

Motion for review of departmental decision of February 14, 1893, 16 L. D., 132, denied by Secretary Smith, July 7, 1893.

RAILROAD GRANT—WITHDRAWAL ON GENERAL ROUTE.

COLE *v.* NORTHERN PACIFIC R. R. CO.

Section 6 of the grant of July 2, 1864, to the Northern Pacific railroad company provides for but one legislative withdrawal on the filing of a map of general route, which becomes at once effective on the approval of said map, and exhausts the legislative will with respect to such preliminary withdrawal, and precludes the subsequent exercise of executive authority to make a further withdrawal for such purpose on a second or amended map of general route.

The map approved August 13, 1870, designated the general route of said road through the Territory of Washington, and authorized the only withdrawal therefor. The later withdrawal based on the amended map of February 21, 1872, was without authority of law, and inoperative as against the subsequent acquisition of settlement rights.

During the pendency of a motion for review before the Department the General Land Office is without jurisdiction to make any disposition of the lands involved.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

On August 2, 1888, the Department rendered a decision in the case of the Northern Pacific Railroad Company *v.* Guilford Miller (7 L. D., 100), affirming the decision of your office refusing to cancel the homestead entry of Miller, for the SE. $\frac{1}{4}$ of Sec. 21, T. 15 N., R. 42 E., Walla Walla, Washington. After said decision was rendered, the case of Charles Cole *v.* Northern Pacific Railroad Company, then pending before the Department on appeal of Cole from the decision of your office rejecting his application to make homestead entry of the SE. $\frac{1}{4}$ of Sec. 19, T. 16 N., R. 44 E., Spokane Falls, Washington, was decided—the Department holding that the facts are in all essential respects similar to those in the case of Northern Pacific Railroad Company *v.* Guilford Miller, and for the reasons therein given reversed the decision of your office.

Similar decisions were made in eighty other cases against the same company, reversing the action of your office rejecting the respective applications, and holding that all of said cases are controlled by the decision in the case of Guilford Miller.

No motion for review was filed in the case of Miller, and the decision of the Department, so far as it affects his rights, as against the railroad company, has become final. But in the case of Cole and in the other cases above mentioned motions for review were filed within the time prescribed by the rules, which have since been pending in the Department undetermined.

The grounds of error alleged in said motion are as follows:

1. That the Secretary erred in holding that said lands, at the date of the several applications, were public lands open to entry; and
2. That the Secretary erred in holding that the withdrawal of lands theretofore made by the Department was null and void and without effect.

As all of these cases are controlled by one or the other principles ruled in the case of Guilford Miller, counsel for the railroad company ask that said decision, so far as it controls the cases now pending on review, may be reconsidered and overruled.

A correct solution of the issues herein presented depends mainly upon a proper construction of the 6th section of the act making the grant to said company.

The act of July 2, 1864 (13 Stat., 365), incorporating the Northern Pacific Railroad Company, granted to said company, to aid in the construction of a line of road between certain points designated in said act, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of the road within the territories, and ten alternate sections per mile within the states, that were free from certain conditions therein named at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office—

And whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

In the 6th section it was further enacted:

That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers upon the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale.

In construing this section, the essential conclusions reached by the Secretary are: (1) That said section provided for a legislative withdrawal of lands within the granted limits upon the filing of a map of general route, which became operative upon the approval of the map, without any other act on the part of the executive authorities, and that the

legislature having definitely expressed the terms upon which a preliminary withdrawal should be made, and the conditions and extent of such withdrawal, its will must be taken to have been exhaustively expressed, and any other withdrawal is without legal force or effect; and (2) That said section having expressly provided for a withdrawal of lands within the granted limits, upon the filing of an approved map of general route, and directing that the pre-emption and homestead laws shall be extended over all other lands along the line of said road, is a mandate effectually prohibiting the exercise of executive authority to withdraw lands within indemnity limits; and (3) That the lands within an Indian reservation created by a treaty, prior to the grant, and falling within the limits of the grant, passed to the company in fee, subject to the Indian right of occupancy, which the government will at its pleasure extinguish, and therefore afford no basis of claim to select other lands in lieu thereof.

That the statute itself, by operation of its own force upon the filing and the approval of a map of general route, immediately withdrew from sale, entry, or pre-emption—except by the company—all the odd sections within the prescribed limits not affected by the exceptions contained in the act, and that such withdrawal derives no force or efficacy from the order of the executive, is so well settled by the decisions of the courts and of this Department that it is unnecessary to discuss the question. *Buttz v. Northern Pacific Railroad Company* (119 U. S., 71); *Southern Pacific Railroad Company v. Orton* (6 Sawyer, 178); *Trepp v. Northern Pacific Railroad Company* (1 L. D., 382); *Hayes v. Parker et al.* (2 L. D., 554); *Northern Pacific Railroad Company* (Copp's L. L. 1st Ed., 377).

The correctness of this proposition being manifest, the Secretary concludes that a withdrawal upon general route, having been once made by force of the statute itself in accordance with the legislative will, independent of any act of the executive, there was no authority in the Secretary to revoke such withdrawal and to substitute another therefor.

It is unnecessary to discuss at length this principle, and I might dismiss this branch of the subject with a simple reference to the reasons assigned in the Guilford Miller case, but, upon further investigation, I find that case is supported not only by the decisions of the courts, but by those of this Department, and I fail to find any ruling of the Department in direct conflict with it.

The case of *Buttz v. Northern Pacific Railroad Company*, *supra*, is authority in support of this view. That case involved the right to an odd section in the Territory of Dakota, lying within the forty mile limits, as shown by map of general route filed in the General Land Office, February 21, 1872. This was the only approved map of general route designating the proposed location of the said road through that territory. The court, after observing that the act not only contemplated

the filing of a map by the company in the office of the Commissioner, showing the definite location, but also contemplated a preliminary designation of the *general route* of the road, and the exclusion from sale, entry, or pre-emption of the odd sections within the granted limits on each side thereof, until the definite location is made, says:

When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department, by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, *the law withdraws* from sale or pre-emption the odd sections to the extent of forty miles on each side.

If, by the filing of a map of general route by the company and approval by the Department, the lands are by force of the statute withdrawn from sale, entry, or pre-emption, until the filing of the map of definite location, it must follow that there is no authority in the executive to revoke and annul such withdrawal, and to substitute another therefor.

So far as it affects the rights, privileges, and powers that attach by force of the statute itself, the fixing of the general route and the definite location of the road are controlled by the same governing principle.

When the map showing the definite location of the road is filed in the office of the Commissioner of the General Land Office, the route is then established, and from that time the right of the company to all lands of the character contemplated by the grant within the prescribed limits attaches absolutely by force of the statute, independently of any other act on the part of the company or of the Secretary's order withdrawing the lands, or giving notice thereof to the local land officers. The route as then definitely fixed ceases to be the subject of change, either at the volition of the company, or of the executive authorities of the government, for the reason that Congress having prescribed the terms and conditions upon which the grant shall attach, and those terms having been complied with, they can be changed only with legislative consent. *Van Wyck v. Knevals* (106 U. S., 360); *Walden v. Knevals* (114 U. S., 373).

The same principle controls in the withdrawal and reservation of lands by the filing of a map of general route, where such withdrawal is provided for by statute, independent of executive action. In the grant to this road, Congress has definitely prescribed the terms and conditions upon which a preliminary withdrawal shall be made, and the terms having been complied with, and a withdrawal made by force of the legislative will, it must, upon the principle above stated, require the consent of the power that created it to authorize a change of route that will operate to annul such withdrawal and create another in lieu of it.

This question was directly presented and considered by the court in the case of the *Southern Pacific Railroad Company v. Orton* (6 Sawyer, 157). The 6th section of the act of July 27, 1866 (14 Stat., 292), granting lands to aid in the construction of the Southern Pacific Railroad, is identically the same as the 6th section of the act incorporating the

Northern Pacific Railroad Company. After reciting said section, Judge Sawyer, who delivered the opinion, says (pp. 178 and 179):

Instantly upon the filing of the plat, the odd sections within the prescribed limits on each side of the line indicated became affected by these provisions; and the statute itself, *proprio vigore*, withdrew them from sale, entry, or pre-emption, except by the company There is no provision requiring the Secretary of the Interior to issue any order withdrawing them—the act itself has that operation by its own force. * * * * *

So there is no authority anywhere in the act for the Secretary of the Interior to revoke the withdrawal, or restore the lands to market, or subject them to pre-emption. His various orders were nullities, as he had no authority whatever to repeal or modify the act of Congress, expressly withdrawing these lands from pre-emption, or other disposition.

Now, if the Secretary has no power to *revoke a withdrawal* made by force of the statute, or to “repeal or modify the act of Congress expressly withdrawing these lands,” it must follow that he has no power to make any other withdrawal on general route, unless it be conceded that two such withdrawals of different lands could exist at the same time—the one made by statute, and the other by executive action.

This principle was also recognized by Secretary Teller in the case of *Hayes v. Parker et al.* (2 L. D., 554), which involved the right to a tract of land in Washington Territory, within the limits of the withdrawal of August 13, 1870, for he says:

It is well settled that the filing of the map of general route under section six of the act in question operates as a legislative withdrawal of the lands within its limits; and if the general route as marked out upon the diagram of August 13, 1870, had been regarded and treated by the company as the real, permanent, and fixed general route of the road, it would probably not have been within the power of this Department to afford any relief to parties making entries before actual notice of the withdrawal.

Again, he says, “the act in the question provides for but one line of general and one of definite location,” and, again: “And a further question is presented, whether lands withdrawn by legislative will can be restored to the public domain by executive action.”

If the act provides for but one map of general route and one of definite location, and if the executive has no authority to restore to the public domain lands withdrawn by legislative will, it must follow as a necessary conclusion that when the routes are once established, either of definite location or of general route, they have ceased to be the subject of change, except by legislative consent.

This is the logical effect of the principles laid down in the cases above referred to, and I do not see that it is in conflict with the principle urged by counsel for the company, that the executive department has the power to withdraw lands for the benefit of the grant within the granted limits, without any direction expressed in the act.

In discussing this question, counsel for the road conceded, for the sake of argument, that the legislative withdrawal attached upon filing

and approval of the map of general route of August 13, 1870, and that no *legislative* withdrawal attached upon the filing of the map of amended general route in February, 1872; but they contend that the withdrawal of 1872 does not depend for its validity upon statutory authority, but upon the authority of the Secretary, in the exercise of his supervisory power, to make withdrawals for the benefit of the grant.

In the case of Julius A. Barnes (6 L. D., 522), Secretary Vilas, in considering the question as to the right of the executive to make withdrawal of lands in the absence of express statutory authority, said:

From an examination of the cases in which this question has been either directly or indirectly adjudicated, the rule may be fairly deduced that in all cases of grants of land to aid in the construction of railroads, where there is no statutory denial of the right to withdraw lands for the benefit of said roads, either by the grant itself or by other statutory enactments, the exercise of such right by the executive would have the effect to reserve the lands so withdrawn for the purposes of the grant, although such withdrawal might not have been contemplated by the grant.

The cases referred to were those of *Wolcott v. Des Moines Company*, 5 Wall., 681; *Riley v. Wells*, cited in *Wolsey v. Chapman*, 101 U. S., 755, and other kindred cases, all of which are relied upon by counsel in support of the validity of the executive withdrawal made upon the map of general route of February 21, 1872. But it will be observed that in all of those cases there was no statutory denial of the right, nor any provision in the act for a legislative withdrawal. But the grant to the Northern Pacific Railroad Company, having definitely prescribed the terms and extent of a withdrawal on general route, by necessary implication, denied the power of the executive to withdraw lands for the same purpose.

They however deny the proposition that but one map of general route was authorized or could be located so as to carry with it the franchise of a legislative withdrawal; and further insist that the map of August 13, 1870, extending from the Montreal river in Wisconsin to the Columbia river in the Territory of Washington, was never approved as to that portion thereof lying in Dakota, Montana, Idaho, and Washington, and that no legislative withdrawal took effect until the map of February 21, 1872, was filed, which was the first map of general route of the entire road filed by the company. Hence, the question as to which was the map of the general route contemplated by the act is a material issue in the case. In support of this proposition, the company contends that the resolution of its executive committee did not authorize the location of a preliminary route and the filing of a map thereof west of the Rocky Mountains and east of the Columbia River; that before action was taken on said maps by the Secretary, the company withdrew the map for that portion of the line, and requested the Department to take no action thereon, and that this action on the part of the company was assented to by the Secretary of the Interior. They also cite the decision of Secretary Teller, in the case of *Hayes v. Parker et al.*, 2 L. D., 554, in support of this theory.

A full history of the filing of the several maps of general route by the company is given in the decision in the Guilford Miller case, but it is unnecessary to make reference to any earlier maps than those of August 13, 1870, as they were the first maps filed by the company that received the approval of the Department.

On July 30, 1870, the company filed with the Secretary of the Interior two maps of general route, one exhibiting that portion of the road beginning at a point on Lake Superior, at the mouth of the Montreal River, and extending thence in a westerly direction to a point on the right bank of the Columbia River, opposite the mouth of Walla Walla river in Washington Territory; the other from the last named point extending along the course of the Columbia River to a point about the first range line west of Willamette principal meridian, and from thence to Puget Sound, accompanying the same with the affidavit of the chief engineer of the company, and asked that withdrawals of land be made in accordance therewith.

On August 4, 1870, the chief engineer of the company addressed the following letter to the Secretary of the Interior:

From information received from my assistants in Montana and Idaho, since my return here from Washington, it is probable the Northern Pacific Railroad Company may wish to vary the location of that portion of their line situated between the mouth of Boulder creek on Jefferson river in Montana and the Columbia river.

There is reason to fear that the valley of the Salmon river may be found impracticable, in which case the company will be compelled to take the next valley to the north of it—the Clearwater.

The president of our company is absent for some days in Minnesota and I desire you not to take any action on the portion of the route named until he returns or I can communicate with him.

To which Secretary Cox, on August 5, 1870, replied as follows:

I have received your letters of the 2d and 4th inst.—the first relating to the legislation as to the main line and branch of the Northern Pacific Railroad, and the second stating it may be necessary to change the route of the road in Idaho from the valley of the Salmon river to that of the Clearwater, and asking suspension of action on that portion of the map until you can advise with the President of the Company.

In reply, I state that I see no objection to a compliance with your request and action will be accordingly suspended.

These are the only letters, as shown by the files and records of this Department, that passed between the Secretary and officials of the railroad company relative to the suspension of the map of general route as to the part of the road covering the lands in controversy.

On August 13, 1870, Secretary Cox transmitted to the Commissioner these maps, with the following letter of that date:

I transmit herewith two maps showing the designated route of the Northern Pacific Railroad.

You will immediately direct the proper local land officers in the States of Wisconsin and Minnesota to withhold from sale, pre-emption, homestead and other disposal, the odd-numbered sections not sold, reserved and to which prior rights have not attached, within 20 miles on each side of the route, and in like manner direct those

officers in Washington Territory to withhold such odd-numbered sections as *lie south of the town of Steilacoom*. The unsurveyed as well as surveyed lands will be included in the reservation, and you will direct the local officers to give notice accordingly, and as the township plats are received by them, they will make the proper notes of reservation thereon.

The withdrawal will take effect from the receipt of order at the local office.

It will be thus seen that these maps were approved for so much of the road as passed through Wisconsin and Minnesota on the east, and through Washington Territory on the west, and rejected for all that part of the road extending through the Territories of Dakota, Montana, and Idaho.

But, on page 6 of their "Supplemental brief on review," counsel for the company state: "The Secretary, by mistake and without the consent of the Company, approved the map as a preliminary line in Washington Territory."

From an investigation of the records of the Department, I am unable to find any evidence to indicate that the withdrawals made in Washington Territory upon the maps filed with the Commissioner, August 13, 1870, were the result of a mistake, but, on the contrary, the action of the Secretary, in transmitting the maps to the Commissioner nine days afterwards, with instructions to make withdrawals thereunder in Wisconsin, Minnesota, and Washington, without exception or qualification, and the acquiescence of the company in such action, would rather seem to indicate that the engineer had communicated with the president of the company, and that no reason was urged why action should not be taken upon the maps. At all events, the Secretary, on August 13, 1870, ordered the Commissioner to direct the local officers "in Washington Territory to withhold such odd-numbered sections as lie south of the town of Steilacoom."

It is contended by counsel for the company that this order of the Secretary had reference only to those lands that lie south of the town of Steilacoom on the line running north and south from Portland to Puget Sound. That this is not the proper construction of the Secretary's order is evident from the fact that, under this order, the Commissioner withdrew all the lands in Washington Territory along the line from Steilacoom to the mouth of the Walla Walla river, and his action in making such withdrawal was fully warranted by the terms of the order.

The map of general route filed with the Secretary terminated at the international boundary line, and, as the Secretary was in doubt as to the right of the company to terminate its line further north of the first point where deep water is found, he determined for the time to make Steilacoom the extreme western limit of the grant. His direction to withdraw such odd sections as lie south of the town of Steilacoom was equivalent to a declaration not to withdraw any lands along the designated route further north than Steilacoom, and this is evident from the

letter addressed by Secretary Cox to the chief engineer of the company, on August 13, 1870, the very day on which the maps were transmitted to the Commissioner, as shown by the following extract:

The line in said Territory skirts along the entire eastern shore of the waters of Puget Sound. The line as thus run passes many places where deep water is found, and no necessity for terminating it on the boundary line can be perceived. The grant is "to some point on Puget Sound," and does not, as I conceive, recognize any right in the company to cover and control all the waters connected therewith. I have therefore, directed the Commissioner to withdraw the odd-numbered sections within 20 miles on each side of the route in Wisconsin and Minnesota, and in Washington Territory only to withdraw such sections south of the town of Steilacoom.

When the maps of July 30, 1870, were filed, they were accompanied by the affidavit of the chief engineer of the company, certifying that the route was so far definitely fixed by resolution of the board of directors as to make it the duty of the executive to withdraw the lands from sale or entry, and the maps defining with precision and certainty the line of the road were stated by the engineer to be the *result of surveys and explorations made for the purpose of determining the proper location of the road*. I can not conceive how words could be more aptly framed to indicate with certainty that it was the intention of the company that the route designated by these maps should be the general route contemplated by the act, or to bring it more clearly within the rule laid down by the Supreme Court in the case of *Buttz v. The Northern Pacific Railroad Company*, where they say that:

The general route may be considered as fixed when the general course and direction are determined after an actual examination of the country, or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country, and the places through or by which it will pass.

While there is confusion as to what was the real character of this map, produced at this late day by a construction sought to be placed upon letters that naturally would have been brought to the attention of the Secretary to meet this question when it was first raised, if the construction now sought to be placed upon said letters was true, yet it is impossible to find, from a careful examination of them and of the balance of the testimony, satisfactory evidence which overcomes the entry upon the map itself, and that map must be considered as it was in the opinion of Secretary Vilas, as a map filed to cover the general route intended to be used by the railroad company in eastern Washington.

My attention has been called to the case of *St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company*, 139 U. S., 1. It is claimed that the question as to the validity of a withdrawal upon a second or amended map of general route was directly involved in this case, and was decided contrary to the views herein expressed.

I have carefully examined said decision, and am unable to gather from the text of the opinion any expression indicating that it was the intention of the court to affirm the validity of a second withdrawal on

general route, or that the attention of the court was called to this question. While it may appear from an examination of the record in that case, as to the issues presented by the pleadings, and the decree of the court below, which was affirmed without qualification, that the right of the Northern Pacific to several of the tracts awarded to it by the decree depended upon the validity of such withdrawal, yet it does not appear from the opinion that this question was decided by the court, as contended for, but, on the contrary, the only expression by the court as to the effect and purpose of the statutory withdrawal provided for by the act upon the filing of map of general route rather indicates that it was the filing of the first map of general route that operated to withdraw the lands, and preserve them for the benefit of the company until the road was definitely located, to the exclusion of any other withdrawal.

The facts bearing upon this question are stated by the court as follows:

The general location of the route of the Northern Pacific railroad was designated in 1869, and a map of it, approved by the Secretary of the Interior, was filed in the office of the commissioner of the general land office in August, 1870; and thereupon the Secretary ordered the withdrawal by the local land officers in Wisconsin and Minnesota, from sale, pre-emption, homestead and other disposal, of the odd-numbered sections not sold or reserved, and to which prior rights had not attached, within twenty miles on each side of the said line, for the benefit of the company. Subsequently, this general route in Minnesota was changed, and a map corrected in accordance with the change, approved by the Secretary of the Interior, was filed in the general land office, on the 8th of October, 1870, and on the 12th of that month the Secretary ordered the withdrawal of the lands in conformity with the new general route adopted. The company then proceeded with the work of definitely locating the line of the road through that State, and on the 21st of November, 1871, filed in the office of the commissioner of the general land office a map or plat of the line thus definitely fixed, approved by the Secretary of the Interior.

Upon these facts the court says:

Besides, the withdrawal made by the Secretary of the Interior of lands within the forty mile limits on the 13th of August, 1870, preserved the lands for the benefit of the Northern Pacific Railroad from the operation of any subsequent grants to other companies, not specifically declared to cover the premises.

If the withdrawal of August 13, 1870, preserved the lands within said limits for the benefit of the Northern Pacific Railroad from the operation of any subsequent grant to other companies, which withdrawal continued in force until the definite location of the road, as held in the case of *Buttz v. Northern Pacific Railroad Company* (119 U. S., 55), and that of the *St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company* (*supra*), I can not see how the withdrawal upon the map of October 8, 1870, could have operated to withdraw and hold in reservation different lands, or to authorize the Secretary to make a withdrawal thereunder, unless two withdrawals could exist at the same time, holding in reservation a greater area of lands than the forty mile limit, designated by the act.

The correctness of the theory that the withdrawal provided for upon the filing of the map of general route could only be once exercised, and that the filing and acceptance of an amended map of general route and the executive withdrawal were without validity or sanction of law, seems to be so well established, both upon reason and authority, that I should hesitate to reverse such a ruling, unless the question had been decided by the supreme court to the contrary, which I do not find in the case of *St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company*, *supra*.

From a careful consideration of this question, I am satisfied that the maps of August 13, 1870, designated the general route of the road through the territory of Washington, and that no other withdrawal on general route was authorized.

The land involved in this case is the SE. $\frac{1}{4}$ of Sec. 19, T. 16 N., R. 44 E., W. M., Spokane Falls land district, Washington. This land was not covered by the withdrawal made upon the map of general route, filed August 13, 1870. Said tract was, however, included in the withdrawal made upon the filing of the map of amended general route, February 21, 1872, but, upon the definite location of the road, shown upon the map filed October 4, 1880, it fell within the indemnity limits, and was selected as indemnity March 20, 1884.

On July 23, 1883, Charles Cole tendered a homestead application for this land, and in his homestead affidavit alleged settlement thereon on April 6, 1878, and continuous residence since October 20, 1878. This application was rejected, on account of the withdrawal for the benefit of said company, and, upon appeal, said rejection was sustained by your office decision of December 8, 1883.

Said decision was reversed by departmental decision of November 19, 1888, and the allowance of Cole's application was directed, under the authority of the holding in the Guilford Miller case.

A motion was duly filed for the review of said decision, which is still pending and now under consideration.

It appears, however, from the record now before me, that after the revocation of the indemnity withdrawals for this company—to wit: on October 27, 1887—Cole presented a second application to enter this land, of which notice was given the company, as required by the circular of September 6, 1887 (6 L. D., 131), and its protest against the allowance of the same was filed on December 6, 1887.

On said protest hearing was had, both parties being represented, resulting in the decision of the local officers adverse to the company, from which the company appealed, but said appeal was, by your office decision of November 19, 1888, held to be out of time, and said decision directed the cancellation of the company's selection and the allowance of Cole's application.

Acting under said decision, Cole was permitted to make homestead

entry No. 4235, for this land, on December 7, 1888, which is still of record.

It must be apparent that, upon the filing of the motion for the review of departmental decision of November 19, 1888, upon Cole's first application, you were without jurisdiction to make any disposition of this land, until said motion had been disposed of. The proceedings had upon the second application by Cole must therefore be held to be irregular, and the company is in nowise prejudiced by its failure to properly defend the case arising thereon, its interests—whatever they may be in the premises—being protected by the motion filed for review of the decision of November 19, 1888, to the consideration of which I shall now proceed.

It will be remembered that Cole alleges settlement on April 6, 1878, and continuous residence since October 20, same year. Having held that there was no authority of law for the withdrawal of lands on the map of amended general route, the lands in question were, in 1878, subject to settlement as other public lands. That he settled at the time alleged is not disputed by the company, and the record made on the second application, at which the company was represented, clearly sustains his allegations in the matter. Being subject to his settlement when made, no subsequent withdrawal or selection could defeat his rights, and, although the allowance of his entry upon his second application was irregular, yet, as he is clearly shown to have the right to make entry of the land, the cancellation of the company's selection will stand, and said entry will be permitted to remain of record awaiting final proof.

Two other questions were involved in the case of Guilford Miller, which were argued upon this motion for review, to wit: whether the executive possessed the authority to withdraw lands within the indemnity limits for the benefit of this grant upon the definite location of the road; and whether lands located within the limits of the Yakima Indian reservation afford a basis for the selection of lieu lands under the provisions of section 3 of the grant to said road.

As the case of Cole is determined by the first proposition herein decided, and it being unnecessary to the decision of this case to make any further ruling therein, I shall not pass upon the remaining questions until a case shall be presented which can only be controlled thereby.

For the reason herein given the motion is denied.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

UNITED STATES *v.* GILBERT ET AL.

In the application of the confirmatory provisions of section 7, act of March 3, 1891, an intervening entry should not be canceled without due notice to the entryman, with full opportunity to be heard in defense of his claim.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 7, 1893.

I am in receipt of your communication of May 17, 1893, transmitting an argument and accompanying papers filed by the attorney for the American Loan and Trust Company, mortgagee of R. L. Swinehart, involving pre-emption cash entry No. 5762 of the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 9, T. 1 S., R. 38 W., being the same land described in departmental decision of June 16, 1892 (14 L. D., 651), wherein you were directed to call upon the transferee, Henry B. Ketcham, or his representatives, to furnish testimony as required by letter of instructions to chiefs of divisions of May 8, 1891 (12 L. D., 450). You state that said decision was duly promulgated, and on November 26, 1892, the local officers transmitted the affidavit of ownership of the land in question by W. R. Hooker, administrator of the estate of Henry B. Ketcham, deceased, with a reference to an abstract of title previously filed in your office; that on December 24, 1892, said entry of Swinehart, made July 9, 1888, was held for cancellation, and the local officers were advised that upon the showing made by the transferee of Gilbert, his entry would be entitled to confirmation under said act of March 3, 1891, if the adverse claimants under Swinehart's entry had been advised of the action in said case; that the record failing to show that they had been so notified, the local officers were directed to notify Swinehart and his assignees of the action had in the case, and that they would be allowed sixty days to show cause why Swinehart's entry should be sustained, and you state that—

In view of the fact that the rights of the intervening entryman, Swinehart, and his mortgagees do not appear to have been considered in said departmental decision, and that charges of fraud and collusion on the part of Gilbert and his transferees are made in said argument and showing, you transmit the same and ask for further instructions in the premises.

In said departmental decision reference is made to the former proceedings involving title to said land, the recommendation of the special agent that Gilbert's cash entry be canceled because the entry was made in the interest of Messrs. "Bird and Ketcham," the cancellation of said entry on May 7, 1888, and the subsequent pre-emption entry thereof by said Swinehart, also to the reversal of said cancellation of Gilbert's entry upon his appeal to the Department on May 8, 1888, and the ordering of a hearing, with notice to the transferee, as required by

the ruling of the Department in the case of Henry C. Putnam (5 L. D., 22; L. & R. Press Copy, vol. 153, 286), and also to your action upon the testimony submitted at said hearing, holding said entry for cancellation. No mention whatever was made of Swinehart's entry in said departmental decision ordering said hearing, but it appears that he was one of the witnesses who testified thereat. If the attention of the Department had been called to the entry of Swinehart when the decision of your office cancelling Gilbert's entry was reversed, and a hearing was ordered, the entry of Swinehart would, doubtless, have been suspended, and he would have been made a formal party to said hearing.

The effect of said departmental decision holding Gilbert's entry to be within the confirmatory provisions of said section was, at least, to suspend Swinehart's entry, whose papers were before the Department, and he would have been entitled to notice thereof. Besides, it appears that you held said entry of Gilbert for cancellation on June 5, 1890, affirming the action of the local officers, and said departmental decision quotes Rule of Practice 90 and states that on account of the informality and inadequacy of this appeal, it might be dismissed, and would be, were it not that on March 3, 1891 (26 Stat., 1095), Congress passed an act which confirms entries like this.

If it be true that the "failure to file a specification of errors within the time required will be treated as a waiver of the right of appeal, and the case will be considered closed" it may well be questioned whether the expiration of the time within which the appellant is required to file his specifications of errors, without a compliance on his part with said requirements, does not cause your decision to become final, so far as the appellant's rights are concerned, especially in the presence of an adverse claim of record.

The affidavits submitted with said argument allege that said entry was made in the interest of the Northwestern Cattle Company, of which said transferee, H. B. Ketcham, was a member; that the affidavit executed by said Gilbert, to show the good faith of said H. B. Ketcham, to which reference is made in said departmental decision, was not understood by him, and was obtained from him while in a state of intoxication; that he never received the amount stated in the deed to Ketcham; that he never complied with the requirements of the pre-emption law; and that the agent of said H. B. Ketcham, to whom he sold said land, knew that he had not complied with the requirements of the law.

It appears that the notice of said showing and affidavits was duly served upon the attorney of the administrator of said H. B. Ketcham, and no response appears to have been made thereto.

In my judgment a hearing should be ordered, at which all parties in interest may appear, and submit testimony as to the good faith of the entrymen and transferees. The decision of the Department in the case of *United States v. Gilbert et al.* (*supra*) is modified accordingly.

COAL LAND—PRIVATE CASH ENTRY.

CHARLES S. LUDLAM.

A private cash coal entry may not be allowed to embrace one tract, taken in the capacity of an assignee, and another under the individual right of the purchaser.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 7, 1893.

I have considered the appeal of Charles S. Ludlam from your decision of November 14, 1890, holding for cancellation his private cash coal entry No. 137 (Ute series), of the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 23, T. 5 S., R. 92 W., made July 12, 1890, now in the Glenwood Springs land district, Colorado, so far as the same covered the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section, because "the same was entered in claimant's individual capacity, while the other tract was entered by virtue of a preference right acquired previously."

Afterwards claimant filed a motion for review of said decision, claiming that he never intended to base his application upon any preference right of entry, and that he acquired the same only for "the express purpose of extinguishing the declarant's title to the land." On October 14, 1892, you denied said motion, citing as authority 10 L. D., 539; 11 L. D., 351; 14 L. D., 636.

With his motion for review was filed the affidavit of the attorney of said claimant, in which he swears that on March 30, 1890, he procured the assignment of the coal declaratory statement made by one D. J. Hutchinson for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section, because said Hutchinson was unwilling to relinquish a part thereof; that on July 7, same year, the claimant relinquished to the United States all his right, title and claim in and to the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section.

The attorney also swears "that said Ludlam never intended to, and did not, and does not now base his application of entry upon any preference right acquired from said Hutchinson;" that said assignment was made for the sole purpose of enabling said Ludlam to make the required oath "that no portion of said tract is in the possession of any other party;" that his attention was not called to paragraph 9 of the regulations under the coal land law, or he would have induced said Hutchinson to have made a relinquishment instead of an assignment of his preference right, and he offers to procure the relinquishment of said Hutchinson and file the same *nunc pro tunc*, if that will cure the defect.

I have carefully examined the entire record, and find no reason for disturbing the conclusion arrived at by your office decision appealed from.

As stated by you, this entry as made is, in effect, two rights of entry exercised by the same person—appellant holding one forty of the tract

entered, as the assignee of Hutchinson, and the other forty as an original entry made by him individually. You properly state that, under the law and regulations and decisions, this can not be allowed. The fact that an assignment was made in March, 1890, and that the relinquishment and entry were not made until in July of the same year, strongly indicate that the claim as now presented was the result of an afterthought, and, if so, the equities which are pleaded have little force. However this may be, the Department must be controlled by the law in the case, and your decision is affirmed.

PRACTICE—RULE FOR ADVANCEMENT OF CASES.

MARQUETTE, HOUGHTON AND ONTONAGON R. R. CO. ET AL. *v.*
ERICKSON.

A case should not be advanced for consideration unless a denial of such action would result in a public injury or injustice.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

Under date of January 26, 1893, Messrs. Copp and Lockett, Attorneys for Erickson, made application to have the case of the Marquette, Houghton and Ontonagon Railroad Company and the Michigan Land and Iron Company *v.* Daniel Erickson, involving land in the Marquette, Michigan, land district, advanced for immediate consideration. This application was denied by departmental letter, dated February 2, 1893. I am now in receipt of your letter of March 15, 1893, transmitting a second application by Messrs. Copp and Lockett, to the same effect as the one denied February 2, 1893.

This application is accompanied by an affidavit made by Rush Culver, in which he states that he has been the attorney for a large number of settlers on that part of the lands formerly granted to the State of Michigan, for the benefit of the predecessors of said Marquette, Houghton and Ontonagon Railroad Company, and forfeited by the act of March 2, 1889, which lies immediately west of the line established March 13, 1889, separating forfeited, from unforfeited lands, and involved in the Secretary's decision of March 2, 1891, (12 L. D., 214), in the case of said Michigan Land and Iron Company. He further states that settlers to the number of fifty or seventy-five settled upon said land in good faith, and that they have maintained their settlements at great inconvenience, and through many hardships, because of the uncertainty in regard to title, their applications to make entry having been suspended on account of the various claims of ownership made to said lands by the Michigan Land and Iron Company.

He then proceeds as follows:

And affiant states that the Attorney General of the United States, upon the recommendation of the Secretary of the Interior, caused suit to be instituted on behalf

of the government, against said Michigan Land and Iron Company, and its grantees, to recover damages for the alleged unlawful cutting of timber on said lands, and to restrain the further commission of waste thereon, which suit is now pending in the district court for the western district, in the State of Michigan; and affiant states that a large proportion of said lands have been burned over by forest fires, and the pine timber standing thereon has been very seriously damaged thereby, so much so that said district court has permitted the defendants in said suit, upon the giving of bonds to account for the value of the same, to cut said timber, and said defendants have, to this affiant's personal knowledge, cut green timber on various claims, not contemplated by the order of said court, to the irreparable damage of said settlers, because he says that, although he has faithfully endeavored to be permitted to interplead in said suit, on behalf of the settlers, he has not been permitted to do so, on the ground that they have no claims of record, disclosing any interest in the subject matter of said suit, but if this case is decided, and the Commissioner's decision affirmed, then the applications of the settlers will be allowed to go of record, and they will be entitled to recognition before said court, in said action, for the purpose of protecting their rights; and affiant says it has been to the interest of the appellants in this present case to delay action, as long as possible, on the claims of said settlers, in the Interior Department, in order to prevent them from being in a position to interplead in said action.

And affiant further states, that the sole question involved in the case at bar is a question of law, viz: The question as to whether the land involved was restored to the public domain by operation of law, by virtue of said forfeiture act of March 2, 1889, or whether it will be necessary first to institute suit in a court of equity to vacate the certification of said lands to the State in 1860; and he says that said question was fully argued, both orally and by brief, before the Secretary of the Interior, when the case involving the location of said dividing line between forfeited and unforfeited lands was submitted, but the Secretary expressly reserved said question for further consideration, as is shown by his opinion in Michigan Land and Iron Company, in 12 L. D., p. 218, but the same has not yet been considered and passed upon, although more than two years have elapsed. The same question of law, however, was presented to the Department in the later case of the New Orleans Pacific Railroad Company, (14 L. D., 321), and was decided in accordance with the decision of the Commissioner in the case at bar, and the said New Orleans Pacific Railroad Company, as affiant is informed, has already been allowed to enter into the enjoyment of the benefit of said decision; and he says that his clients being plain, ordinary citizens, are unable to understand why this New Orleans Railroad Company, whose claim was presented to the Department after theirs was, should have had this question of law settled and determined, while they have waited nearly a year longer, and have not yet had an authoritative decision on the same question which is raised in their cases.

While it is true that the first application was unaccompanied by any affidavit assigning reasons why the case should be made special, it is also true that the affidavit now before me does not state any material facts which were unknown to the Department when the first application to advance the case was denied. The case will probably be reached, in regular order, within a few weeks.

In my opinion, the practice of advancing cases is one which should not be encouraged.

It must be assumed that all litigants appear before the Department in good faith, and each one is entitled to have his case considered in the regular order in which it is reached in the transaction of business before the Department. No case can be made special without, in a

greater or less degree, working a hardship to other litigants, and as a rule, cases should not be advanced, unless a denial to take such action would result in a public injury or injustice.

No sufficient reason is shown why this application should be granted, it is therefore denied, and you will notify the parties accordingly.

PATENT—SECTION 2447 R. S.—ABERNETHY ISLAND.

PORTLAND GENERAL ELECTRIC CO.

When a patent has been issued by fraud, accident or mistake, a reconveyance to the government of the land so patented, may be made, and a new patent issue to the proper owner.

Section 2447 R. S., authorizes the issuance of a patent to the assignee of a confirmed claim, where the confirmatory statute makes no provision for the issue of patent.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

With your letter ("D") of April 22, 1893, you transmit the petition of the Portland General Electric Company, a corporation existing under the laws of the State of Oregon, praying that a patent be issued to said company for certain islands situated in the Willamette River, near Oregon City, and described in the plats of the official survey on file in your office as lot 5, Sec. 36, T. 2 S., R. 1 E., W. M., and lots 8 and 11, Sec. 31, T. 2 S., R. 2 E., W. M., Oregon.

It is alleged in the petition, which is duly sworn to—

1st: That the lands above described constitute what has been known for more than forty-two years last past as "Abernethy Island."

2d: That the company petitioning "is the legal assigns of the companies" described in section 11 of the act of Congress approved September 27, 1850 (9 Stat., 499).

3d: That said island is located in the Willamette River, immediately above what is known as "The Falls of the Willamette," near Oregon City, and is wholly surrounded by navigable water during the whole year.

4th: That at the date of the passage of the act of 1850 (*supra*), the said Abernethy Island was public land of the United States.

5th: That petitioner and its assignors have been in the uninterrupted possession of said Abernethy Island and the whole thereof for more than forty-two years last past, and are now in possession, and petitioner has erected thereon large and expensive works connected with the business of electric lighting at a cost of more than \$150,000.

Section 11 of the act of 1850 provides as follows:

And be it further enacted: That what is known as the "Oregon City Claim," excepting the Abernethy Island, which is hereby confirmed to the legal assigns of the Willamette Milling and Trading Companies, shall be set apart, and be at the dis-

posal of the legislative assembly, the proceeds thereof to be applied by said legislative assembly to the establishment and endowment of a university, etc.

In your office letter ("E") of December 15, 1892, addressed to Hon. John H. Mitchell, U. S. Senate, you say:

The following table copied from the official plat, approved September 9, 1865, gives the meanders of the "rocky island" (referred to by you) in the Willamette River, immediately above Oregon City, and situated in Sec. 36, of township 2 south, range 1 east, and section 31, township 2 south, range 2 east. . . . The said island was surveyed by David P. Thompson, U. S. Deputy Surveyor, under special instructions issued to him, bearing date July 15, 1865, and he was authorized and instructed to make returns of said survey under his contract No. 109, dated January 30, 1865. The plat of the island was transmitted with the surveyor-general's letter, dated September 27, 1865, and received at the General Land Office November 4, 1865. That portion of the island situated in Sec. 36, T. 2 S., R. 1 E., is designated as lot 5, containing 7.63 acres, and that portion in Sec. 31, township 2 south, range 2 east, is designated as lot 11, containing 16.27 acres.

Nothing is found of record in this office designating said island as "Abernethy Island." . . . The island referred to in your letter of 12th instant as lot 8 lying north of "Rocky Island," described above, appears to been surveyed at the time of the original subdivisional survey of township 2 south, range 2 east. The island is designated as lot 8 of section 31, township 2 south, range 2 east, W. M., containing 1.36 acres.

While the plats of survey on file in your office do not designate the island in question as "Abernethy Island," it is contended that lot 5, in Sec. 36, T. 2 S., R. 1 E., containing 7.63 acres, and lot 11, in Sec. 31, T. 2 S., R. 2 E., containing 16.27 acres, and lot 8, in last named section, containing 1.36 acres, constitute the "Abernethy Island," which was granted by the act of 1850 (*supra*).

In your letter transmitting the petition you say:

No claim appears to have ever been filed for these lands on account of the grant, and this office seems to have entirely disregarded the same, for the lines of the public survey were extended over them in 1851 and 1852, and on November 21, 1865, Allen M. Thompson was permitted to file pre-emption D. S. No. 298 for lot 11, before described, upon which patent was issued June 1, 1866.

This petitioner has purchased any right Thompson may have acquired under said pre-emption claim, and offers to reconvey the land to the United States, to the end that its request for patent under the grant may be favorably acted on.

Conceding that lot 11 is a part of the Abernethy Island granted to the company by the act of 1850, it is manifest that it was error to patent the same to Thompson.

When patents have been issued by fraud, accident, or mistake a reconveyance of the land so patented to the government may be made, and the land awarded to its proper owners, evidenced by a new patent. Juniata Lode, 13 L. D., 715.

While the act of 1850 (*supra*) contains no provision for the issue of a patent for "Abernethy Island," section 2447 of the Revised Statutes provides:

In case of any claim to land in any State or Territory, which has heretofore been confirmed by law, and in which no provision is made by the confirmatory statute for the issue of a patent, it may be lawful, where surveys for the land have been or

may hereafter be made, to issue patents for the claims so confirmed, upon the presentation to the Commissioner of the General Land Office of plats of survey thereof, duly approved by the surveyor-general of any State or Territory, if the same be found correct by the Commissioner. But such patents shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claims to the same land.

In your letter transmitting the petition you say:

It would seem that under this section a survey of the claim must first be made and approved, and that the duties of this office thereunder are merely ministerial and does not contemplate extended investigation to determine the rights of parties thereunder or the identity of the land involved in said claim.

* * * * *

Under the peculiar circumstances, having doubt as to my authority in the premises, and not desiring to cast a cloud on the company's claim, by denying its application and forcing it to appeal, I have thought it advisable to submit the entire matter for your consideration, with this statement of facts, to the end that I may be instructed as to the powers of this office under section 2447, R. S., and the further course to be pursued, if any, to secure a proper survey of this claim as the basis of patent, should you determine that authority is given by said section to issue patent at this time on said claim.

If it be true that the aforesaid lots, viz: lot 5, containing 7.63 acres, lot 8 containing 1.36 acres, and lot 11 containing 16.27 acres, constitute a tract of land which is identical with the Abernethy Island, granted by the act of 1850 (*supra*), it is manifest that said lots belong to the legal assigns of the Willamette Milling and Trading Companies. In such case the patent applied for would be only the evidence of a title already granted.

The Department will not assume jurisdiction as to the rights of parties under the grant. Since the lots above described have already been surveyed, and their areas correctly determined, the only question, as it seems to me, to be determined is the identity of these lots with the Abernethy Island, named in the grant. That being shown, authority is given in section 2447 of the Revised Statutes (above quoted) to issue a patent to the legal assigns of the Willamette Milling and Trading Company.

Two questions of fact are therefore necessarily involved, namely:

1. Is petitioner as a company the legal assignee of the company named in the grant of 1850 (*supra*)?
2. Are the lots for which patent is asked identical with the Abernethy Island named in the grant?

As to lot No. 8, above described, it was practically held, in the case of "State of Oregon," decided February 16, 1893 (L. & R. press copy-book, No. 262, p. 174), that the same was identical with the "Abernethy Island" named in the grant of 1850.

The company in its petition proffers "to make proof in such time and place as the Commissioner or Department may indicate of all the

material facts set out in this petition." You will, therefore, call on the company to furnish such further proof as may be necessary to clearly and fully establish the facts above indicated, and then take such further steps in the premises as the facts shown may warrant, in the light of the matters herein set forth.

MCINNIS ET AL. v. COTTER.

On motion for rehearing the departmental decision of December 19, 1892, 15 L. D., 583, was vacated by Secretary Smith, July 7, 1893, and a further hearing ordered.

CONFIRMATION—TRANSFeree—ATTORNEY.

GURLEY v. MARTIN ET AL.

A transferee who employs another to procure title to a tract of land, and leaves the method thereof to such agent, does not occupy the status of a purchaser or incumbrancer in good faith, if said agent secures the title to said land through an entry made in the interest of said transferee, even though the transferee had no knowledge of such fraudulent action.

An attorney who procures a fraudulent entry to be made should be disbarred from practicing before the local office.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

On August 30, 1881, H. A. Yonge made timber-culture entry No. 2430, for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 30, T. 9 S., R. 6 W. (Concordia series), Salina, Kansas.

On April 15, 1884, he relinquished the entry, and on the same day Mary J. Martin filed her pre-emption declaratory statement for the same land, alleging settlement thereon April 1, of that year. She submitted her final proof for the land November 1, 1884 (six months and sixteen days after filing), and on December 1, 1884, final certificate, No. 2643, was issued.

On December 19, 1889, James M. Gurley filed his contest affidavit against the entry, charging, among other things, that the same was "made in fraud and in violation of the spirit and letter of . . . the law;" that she made the entry under a contract, for a consideration then agreed on by and with one Jacob Markley that said tract should be deeded to Jarvis, Conklin and Co., or to some one in their interest, as soon as title should be obtained from the United States; that said Jarvis, Conklin and Co. furnished the money under said agreement to obtain title from the United States, and procured a deed of conveyance of said land to one Robert C. Wear, for and in the interest of said company; that said company enclosed the same in a tract of more than

three thousand acres with a barbed wire fence, and has held the land ever since; that the said Mary J. Martin never established a residence on the land in good faith; that no house was built thereon; that no part of the land was cultivated; that she lived with her father and never at any time lived on the land, either before or after entry, etc.

Hearing was had, and the register and receiver recommended the cancellation of the entry, and, on appeal, your office, by decision dated May 31, 1892, affirmed that action. H. M. Beardsley and H. C. Gilbert, claiming to be transferees, have appealed to this Department.

It is admitted that the land in question was deeded by Mary J. Martin to R. C. Wear on November 27, 1884, and that Wear subsequently conveyed the same to H. M. Beardsley and H. C. Gilbert.

A duly certified abstract from the register of deeds of Mitchell County, Kansas, dated July 1, 1891, shows that the receiver's receipt was dated December 1, 1884 (same date as final certificate above noted); that Mary J. Martin (a widow) conveyed the land by warranty deed to Robert C. Wear for the consideration of \$1,600, November —, 1884; that on January 7, 1885, Wear mortgaged the land in question, with other lands, to Jarvis, Conklin and Co., for the consideration of \$25,000; that on May 7, 1885, Robert C. Wear conveyed the land in controversy, with other land, by warranty deed to H. M. Beardsley and H. C. Gilbert, for the consideration of \$65,000.

The abstract shows no release of the mortgage given by Wear to Jarvis, Conklin and Co.

I think the testimony sufficiently shows that neither the residence nor the improvements were such as to indicate good faith. In fact, it would appear that no habitable house was ever built on the land; there was no cultivation, and but a small amount of breaking, which soon went back to buffalo grass.

No motion is filed asking for confirmation under the 7th section of the act of March 3, 1891 (26 Stat., 1095), but it is insisted that your office erred "in not holding that inasmuch as H. M. Beardsley and H. C. Gregory (Gilbert) purchased this land on May 7, 1885, it came within the confirmatory provisions of the act of March 3, 1891."

Nearly all the testimony relating to the charge that Mrs. Martin entered the land in pursuance of a contract to convey the same to some one in the interest of Jarvis, Conklin and Co., is given by H. A. Yonge, of Beloit, Kansas, who was the contestant's attorney.

Yonge testifies that in 1884 Jarvis, Conklin and Co. desired to obtain a large tract of land for stock purposes, and employed him to obtain title to the several tracts wanted; that prior to his employment as such agent, Samuel M. Jarvis, of the firm of Jarvis, Conklin and Co., came and looked over the county, and concluded he could buy enough to make a body of between two and three thousand acres, at reasonable prices; that he examined a map in his (Yonge's) office to determine what quarter sections to buy, also to get the ranch as compact as pos-

sible; that the land in controversy was taken into consideration; that he and Jarvis talked over the question of probable prices, but nothing was agreed upon as to what prices were to be paid, or how the title was to be acquired. He further says:

I made a plat of the ranch and the lands which were wanted, and saw the parties who were the owners of the lands; ascertained the prices they could be had for, and mailed a plat, together with a statement of the prices, to the company and when directed, closed the trade. Some time after, Mr. Jarvis was here, and after Mr. Markley had made the arrangements with Mary J. Martin for this tract of land, I executed a relinquishment of timber entry (land in controversy) and mailed it to the land office at Concordia, with the application for the pre-emption entry of Mary J. Martin, and Jarvis, Conklin and Co. paid me \$160 for relinquishing that timber entry.

Yonge also testified that he made out the declaratory statement for Mrs. Martin, advanced the money to pay for the same, and charged it to the account of the company; that this money was paid out on an agreement made by Jacob Markley, for the purpose of acquiring title to the land for Jarvis, Conklin and Co.; "The application to make final proof was made by me and sent to the land office, and on proof day she and her witnesses came into my office in Beloit; I wrote the proof and same was afterwards sworn to;" that he wrote the deed (executed by Mrs. Martin to Wear), and drew on Jarvis, Conklin and Co., for the money to pay the government for the land, together with all costs and expenses, including pay for his own services, and one hundred dollars to pay Mrs. Martin the contract price for the land as made between her and Markley; that he advanced these costs for the company, including the \$100 paid Mrs. Martin; the final receipt was returned to him, and either the deed or final receipt afterwards sent to the company; the deed was made to the party (Wear) according to instructions given by the company; that after the contest was initiated, Mrs. Martin came to his office, and seemed worried, being afraid she would be implicated in a criminal prosecution; *that the mode of acquiring the lands desired for the ranch "under certain limitations was left to me;"* that he talked with Mr. Markley, who had made the contract with Mrs. Martin, before the latter had entered upon the land; that he acquainted Mr. Gurley (contestant) with "part of the facts" upon which contest was brought, and he may have approached a dozen persons to get them to contest the entry; that there were several subdivisions of government land held by different parties, and "we" (Jarvis and himself) talked over the question of probable prices; that the one hundred and twenty acre tract of land, proved up and patented by Silvia Belding and deeded to Robert C. Wear, was done by an agreement "made by me with Silvia Belding, through Jacob Markley;" that he was employed (as stated) by the company to obtain title to these lands, and there were three tracts of government land inside the ranch, in addition to isolated forties;

the only way the title could be procured to these tracts of government lands was by procuring some one to put entries on them and make improvements, and establish a

residence and comply with the public land laws; I was enabled to go down to the ranch to get persons to settle on these lands, and in fact I did not know who to get to make the entries, and I talked the matter over with Jacob Markley—told him what was wanted; he afterwards stated to me that Silvia Belding and Mary J. Martin would each make an entry; I also paid Silvia Belding the contract price for the land agreed on between her and Markley.

At the time these lands were sought after, an agreement had been made for the purchase price of the land and the price submitted to the company; that he drew a sight draft on the company at Kansas City, for the purchase price.

It appears that a body of about three thousand acres of land was secured for the company, and the whole enclosed with a barbed wire fence. Just how much of this body of land belonged to the government when the ranch was located does not clearly appear.

Jacob Markley, who it is alleged made the aforesaid contract with Mrs. Martin, positively denies making any such contract, either for himself or any one else. He swears, however, that attorney Yonge tried to get him (Markley) to induce some one to file on the land; that he (Yonge) wanted the land.

Yonge tried to get Markley, on cross-examination, to admit that he (Markley) induced Silvia Belding to settle upon and make final proof for one of the tracts of land included in the ranch at his (Yonge's) suggestion. Markley refused. It appears, however, that Markley was in some way interested in securing the ranch for the company.

The only evidence tending to corroborate attorney Yonge's statements, above given, is that given by contestant Gurley and witness W. H. Simmons.

Those witnesses testify that Mrs. Martin admitted to them, when she was served with the notice of contest, that the charges in the contest affidavit, which were read to her, were true. Defendant's witness W. W. Abercrombie, however, swears that Mrs. Martin told him that the contest affidavit was not true; that she made no contract, prior to filing, to convey the land to any one. Neither Samuel M. Jarvis, nor Richard B. Conklin, of the firm of Jarvis, Conklin and Co., testified in the case; nor did H. M. Beardsley or H. C. Gilbert, who appear to be joint owners of the equity of redemption, testify.

Jarvis, Conklin and Co., as shown in the abstract, have an uncanceled mortgage on the land, which in that condition was conveyed by Wear to Beardsley and Gilbert, as above shown.

Neither the transferees nor the mortgagees have filed any motion for confirmation under the act of 1891, *supra*. It is shown that the land was sold and encumbered after final entry; that there was no adverse claim prior to entry, and the land was so sold and encumbered prior to March 1, 1883.

It is not shown, however, that the purchase or encumbrance of the land was made in good faith, and without any knowledge or participation in the alleged fraud; and, if attorney Yonge's testimony be true,

that can never be shown, for, although Messrs. Jarvis, Conklin and Company may have been in ignorance of the disreputable methods employed by Yonge to obtain the lands, yet if Yonge was their agent, and the method of obtaining the lands was left to him, as he avers, the company, without any knowledge of these methods, could not claim immunity from the consequences of the fraud.

It is alleged in the appeal that your office "erred in attaching any weight to the testimony of H. A. Yonge, who according to his own testimony was perpetrating a fraud on the government and then became the attorney for the contestant."

I think there is much force in this specification. It is apparent that Yonge, if his testimony be true, sought illegal methods to acquire the land for the company. From his testimony, it manifestly appears that he not only knew that Mrs. Martin settled on the land in the interests of the company, but it was through his efforts that she was induced to do so. Not only that, but he wrote her final proof, in which she was made to say:

Nor have I settled upon and improved said land to sell the same on speculation, but in good faith to appropriate it to my own exclusive use or benefit; and that I have not directly or indirectly made any agreement or contract in any way or manner with any person or persons whomsoever by which the title, which I may acquire from the government of the United States, should inure, in whole or in part, to the benefit of any person except myself.

Having been instrumental in inducing the widow, Mrs. Martin, to settle upon and make final proof for the land in the interest of another, and having written for her the final proof, in which the above statement appears, it is difficult to see how he can escape the imputation of the crime of subornation of perjury. If his statements are true, it is manifest that the entry should be canceled; but I hesitate to take such steps upon Yonge's testimony alone.

I think however a hearing should be ordered, of which all parties in interest should be duly notified, including Mrs. Martin and the contestant.

Evidence should be taken touching the statements above given by Mr. Yonge—his alleged agency for Jarvis, Conklin and Co.—and the bona fides or otherwise of the purchasers and encumbrances of the land in controversy.

You will also detail a special agent in the field, who may be present at the hearing. He should be directed to investigate the charges as to other government lands being included in the ranch of Jarvis, Conklin and Co., and whether such government lands, if any, have been entered since 1884, by whom, when, etc., the good faith, or want of good faith, as the case may be, and have the report of such agent submitted to your office as soon as practicable, with a view to the suspension of any entries that may have been unlawfully made.

H. A. Yonge's name is not borne on the rolls as one authorized to practice before this Department. You will direct him however to be

notified to show cause within thirty days from receipt of notice, why he should not be disbarred from practicing before the local land offices, by reason of his self-confessed participation in the alleged fraud relating to the entry of Mrs. Martin and Silvia Belding.

The decision appealed from is accordingly modified.

RAILROAD GRANT—WITHDRAWAL—ACT OF APRIL 21, 1876.

BROWN v. NORTHERN PACIFIC R. R. Co.

A private cash entry is not within the scope of the act of April 21, 1876, and such an entry allowed after withdrawal on general route, and prior to the receipt of notice thereof at the local office, does not operate to except the land so entered from the effect of said withdrawal.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

I have considered the appeal of William H. Brown from your decision of March 28, 1892, rejecting his application tendered February 10, 1892, at Vancouver land office, Washington, to make homestead entry for Lot 3, Sec. 27, T. 11 N., R. 2 W.

Said land is within the withdrawal of August 13, 1870, on general route, for the Northern Pacific Railroad Company, and within the primary limits of the grant to said company, as shown by its map of definite location, filed September 13, 1873.

On October 18, 1870, J. O. H. Spinney made private cash entry (No. 3172) of said tract, said land having been previously offered for sale, which entry was canceled February 3, 1875, and the purchase money refunded, because the entry was illegal for the reason that it was made subsequent to the filing of the map of general route on August 13, 1870.

The sixth section of the act of July 2, 1864 (13 Stat., 361, 369), making the grant to said company, provides—

That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act.

This provision of the act was construed in the case of *Buttz v. Northern Pacific Railroad* (119 U. S., 55, 72), as follows—

When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side.

The land in question was so withdrawn before Spinney made his private cash entry, and the same was therefore illegal and did not ex-

cept the land from the grant to the company, which had already attached.

It is contended on behalf of Brown that inasmuch as the notice of the withdrawal of August 13, 1870, was not received in the local office until after Spinney made his cash entry, therefore the land in question was not affected by said withdrawal. This contention cannot be sustained.

A private cash entry does not come within the scope of the act of April 21, 1876 (19 Stat., 35), which was passed "for the purpose of confirming entries made in good faith by actual settlers, after the date of filing the map and prior to the receipt of notice of said filing by the local officers."

It is not claimed that Brown was an "actual settler" on this land, and his entry was not therefore confirmed by this act.

Your judgment is affirmed.

RAILROAD GRANT-INDEMNITY SELECTIONS.

ALABAMA AND CHATTANOOGA R. R. CO. *v.* MORRISON ET AL.

A selection of indemnity lands in which the lost lands are not specified is no bar to a subsequent selection of the same lands by the company with a proper designation of losses.

No rights are acquired as against an indemnity selection by settlement on lands previously withdrawn for the benefit of the grant.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

I have again considered the case of the Alabama and Chattanooga Railroad Company *v.* Malcolm Morrison *et al.*, involving lands in T. 22 N., R. 6 E., St. Stephens meridian, Montgomery land district, Alabama, on appeal by the company from your decision of October 2, 1891, holding for confirmation, as against the protest by the company, entries made by Morrison and five others for lands in said township.

These lands are within the indemnity limits of the grant for said company and opposite that portion originally conferred upon the Northeast and Southwestern Railroad Company.

In December, 1879, the company selected a part of the land now in question, but failed to specify the lands lost to the grant in lieu of which such selection was made.

In March, 1884, it again applied to select all the lands in question, said list containing a designation of losses and being otherwise in form. This list was rejected by the local officers, on account of the conflict in part with the previous selection of 1879, from which action the company appealed.

By letter of April 22, 1885, your office returned the lists of 1879 and 1884 to the local officers, with the following suggestion:

Both of these lists are herewith returned that they may be properly filed in your office, with the suggestion to Mr. Anderson that all the lands covered by the selections of Mr. Hertz, so far as they may be found free from conflict, shall be included in one list, upon which, when regularly filed in your office, you can certify to the payment of the required fees by reference to the list filed by Mr. Hertz.

If Mr. Anderson files one complete list as suggested, you will then cancel upon your records the duplicate selection made by Mr. Hertz, record the new selection of the same tract, making reference to the letter.

Your decision states that pursuant to the said letter, a new list of selections was filed, which omitted the lands in question.

The list referred to is a list filed May 4, 1885, for four hundred and forty acres, and does not contain any of the lands in the list of 1884.

The company urged that the selection of May 4, 1885, was in no wise a waiver of its selection of 1884, which was in all respects regular.

In the previous consideration of this matter, in departmental communication of February 21, 1891, it is stated:

The selection of 1879 was incomplete, in that it failed to designate a basis for the selections made therein, but, even had it been regular, such selection would have been no bar to a subsequent selection by the company; hence, if the selection of 1884 was regular, as alleged, it should have been allowed, and the appeal taken from the rejection of said list would seem to have protected the company in any rights it may have gained by such selection.

There does not seem to be any authority for the action taken by letter of April 22, 1885, in returning both lists to the local office, and the "suggestion" made therein is not very plain, when it is remembered that the only "conflict" referred to in the rejection of the list of 1884 was a conflict with a previous selection made by the company. This letter did not dispose of the company's appeal from the rejection of its list of 1884, and the subsequent selection referred to can not be construed as an abandonment of such selection.

The lands directly in question in this case are all in township 22 north, range 6 east. The list of 1884 contained about 1,700 acres in this township. There is nothing to show that there were any conflicting claims with the selections in said township in 1885, and it would be unreasonable to presume that by the selection of May 4, 1885, for only four hundred and forty acres, all of which were without said township, the company intended to abandon the selections made in 1884, and especially when the selecting agent swears that the selection of 1885 was made on his own motion, without reference to the suggestion contained in the letter of April 22, 1885, and was in no wise intended as an abandonment of the selection made in 1884.

To a proper adjustment of the rights of all parties in the premises, it therefore becomes necessary to determine the rights of the company to the lands in question under the selection made in 1884.

Neither the list nor the papers relative thereto are before me, and I therefore, herewith, return the record forwarded with your letter ("F") of February 24, 1892, and direct that the list of 1884 be called for, and upon its receipt that the complete record be again transmitted for my further consideration.

The list of 1884 is now with the record before me, and as it appears to be regular and in form, it is herewith returned for allowance, unless, for some reason, other than the previous selection of 1879, the lands embraced therein were not subject to the selection when applied for, or the basis assigned is faulty.

The entries here involved were made in March, 1891, and but two of the entrymen, viz: Morrison and Hendrix, allege settlement prior to the selection of 1884.

As the lands had been withdrawn on account of the grant since 1856, and being embraced in a pending selection were not restored by the order of August 15, 1887 (*Dinwiddie v. Florida Railway and Navigation Company*, 9 L. D., 74), no rights were acquired as against the grant by the settlements of Morrison and Hendrix, and all the entries must be held subject to the rights of the company under its selection. *Shire et al. v. Chicago, St. Paul, Minneapolis and Omaha Railway Company*, 10 L. D., 85.

I have therefore to direct the re-examination of said list, and, if approved, said entries will be canceled.

HEIRS OF RICHARD K. LEE.

On review the departmental decision of July 25, 1892, 15 L. D., 107, was set aside by Secretary Smith, July 7, 1893, and the case remanded for the consideration of final proof not before the Department at the time of its former action.

DESERT LAND CONTEST—EQUITABLE ACTION.

SOUTH *v.* JOHNSON.

A desert land contest on the ground of non-compliance with law must fail where it appears that the claimant prior to the expiration of the statutory period had effectually reclaimed the land, and that his failure to maintain the requisite water supply was due to the wrongful act of the contestant. Nor will the intervention of such a contest defeat equitable action on the claimant's final proof, submitted out of time.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 7, 1893.

I have considered the case of John M. South *v.* Elizabeth A. Johnson, on appeal by the latter from your decision of March 25, 1892, holding for cancellation so much of her desert land entry as is embraced in the homestead application of the former, to wit: lot 1, and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 1 T. 20 N., R. 23 E., and lot 4, and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 6, T. 20 N., R. 24 E., Hailey, Idaho land district.

The record shows that on January 19, 1886, Elizabeth A. Johnson made desert land entry for the above described land, together with the W. $\frac{1}{2}$ NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 1, T. 20 N., R. 23 E., same land district. On March 25, 1889, the plaintiff filed an affidavit of contest against said entry, and notice being served upon defendant, a hearing was duly had, and upon the record and evidence before them, the local

officers found in favor of the plaintiff, and recommended the cancellation of the entry, from which action defendant appealed, and on September 29, 1891, you passed upon the case, and sustained their judgment. Thereupon the defendant filed a motion for a review of the case, and sundry affidavits and the decree of the district court of Lemhi county, Idaho, were presented in support of the motion and on March 25, 1892, you again considered the case, upon review, and found the facts to be that the land had been reclaimed, and that the entrywoman had sufficient water upon the land to thoroughly irrigate the same, but that she had failed to make proof within three years, and that the adverse claim of South, the contestant, for the tracts for which he applied to make homestead entry, would prevent her from submitting her case to the board of equitable adjudication, and you so modified the former decision as to cancel that portion of the entry applied for by South, and referred the final proof as to the balance of the entry, with certain papers, to the board of equitable adjudication for its consideration, from which decision the entryman appealed.

The affidavit states: "That Johnson has not reclaimed the land, as required by law, and made proof of the same, and this the said contestant is ready to prove," etc.

This case is somewhat similar to that of *Meads v. Geiger* (16 L. D., 366), in which it was found that Geiger had from the first been untiring in his efforts to effect reclamation, but owing to a mistake of his engineer, the water in his ditch came only within half a mile of the land at the end of three years, and while he was laboring to overcome this condition, a contest was initiated. It was said:

It will be observed at the outset that the statute makes no specific provision for forfeiting the rights of the entryman in the event that reclamation is not effected, nor final proof submitted within the period designated.

The case was distinguished from that of *Lee v. Alderson* (11 L. D., 58), in which case the entryman had not shown good faith nor diligence.

In the case at bar, after making the entry, to wit, on June 1, 1886, a "notice" of a water claim for 1000 inches of water from Pratt creek, for irrigating purposes, was duly filed for record in the recorder's office of Lemhi County, Idaho, by I. S. Johnson, Elizabeth A. Johnson and John M. South, that they caused to be cut a ditch from said Pratt creek, which said ditch entered section 6 of T. 20 N., R. 24 E., near the north-east corner and runs in a south-west direction across the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said section, and turning west, it ran entirely across the S. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of section 1 of T. 20 R. 23 E.; that at a point in the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 6, T. 20 R. 24, a lateral was cut carrying water north-west to about the centre of the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of section 6 of T. 20 R. 24 E., then turning west it ran across the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of section 1, T. 20 R. 23 and to about the centre of the NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said section 1, where it turned north and passed out of the section. Mrs. John-

son had caused to be cleared and cultivated to wheat, oats, clover and timothy about eighty acres of said land, and had water for irrigation purposes upon each subdivision of the entry.

It appears that I. S. Johnson sold his one-third interest in said ditch and water right to one, William I. Wilson, on February 25, 1888, and made a quit claim deed therefor on that day. Wilson thus became a tenant in common with Mrs. Johnson, defendant, and with South.

This deed recites the fact that this undivided one-third interest is in "that certain water right to one thousand inches of water taken out of Pratt creek, and which right was claimed or taken by Isaac S. Johnson, Elizabeth A. Johnson and John M. South." It also transfers "the undivided one-third of a ditch now made and constructed and used in connection with said water right for the purpose of conveying the water so claimed to the lands of said locators," etc.

It appears that said South and Wilson cut off the water from the lateral ditch of Mrs. Johnson, and deprived her land of water, and she was compelled to bring an action in the territorial court to maintain her rights, and while the land was so deprived of water, by the wrongful act of her co-tenants, as was determined by the district court of Lemhi county, Idaho, the plaintiff herein brought this action, and asked to have her entry canceled. And while the suit was so pending, and before her right to one-third of the water in the ditch had been decreed to her, as was afterwards done, the local officers decided this case against her, and you, following said decision, held her entry for cancellation.

The testimony shows that the affidavit is not true, as it stands, nor is the main branch of it true, for she has substantially complied with the law in the matter of reclaiming the land. The contestant, in his testimony, says the claimant, Mrs. Johnson, does not own any water right or right in the ditch, but she and her husband both say that she owns one-third interest, and the court so found and so decreed, showing that South and Wilson were denying the rights of their co-tenant when they cut off the water, thus the real ground of his complaint was founded on his own wrong.

Testimony was taken showing that the entrywoman had not erected buildings and fences on the land. The law does not require such improvements; she has conducted water upon each "forty-acre tract", and has cleared a large part of the land of sage brush, and broken and cultivated portions of six of the subdivisions.

It is quite apparent that the contestant has very malicious feelings toward the husband of the entrywoman; he says he would not consider it any more harm to kill him than it would be to kill a rattlesnake, and acting in this kind of spirit, he cut off the water from the entrywoman's ditch, and then swears she has no water to irrigate the land, and having compelled her to go into court to maintain her rights, he seeks to have her entry canceled before she can obtain the relief she asked.

The regulations,—General Circular, 1889, page 38,—say,

In a number of cases persons who have initiated titles to public lands under the desert land act of March 3, 1887, have allowed the limitation provided by statute, to expire without making final proof of reclamation of the land, and final payment In all such cases as now exist, or may hereafter exist, the register or receiver will notify the parties of their non-compliance with the law, and ninety days from date of service of notice will be allowed to each of them to show cause why their claims should not be declared forfeited, and their entries canceled.

In the case at bar no notice was given the entrywoman, but in April, 1889, she gave notice by publication, and made final proof and tendered payment of the balance of the purchase money. The proof was rejected because the contest was pending. If it be claimed that the notice of contest took the place of the notice required by the regulations, it is shown that she has responded as required.

She has filed affidavits, and shown by testimony taken at the hearing that she had lost the receiver's receipt at the time her house burned, and she claims that she did not know that the three years expired in January. She shows that she was taken sick early in January, and was not able to attend to anything until in March. You say her sickness might have furnished an excuse for the neglect to make proof, but that it cannot be considered in the face of an adverse claim. In *Lawrence v. Phillips* (6 L. D., 140) Miss Phillips had made homestead entry and substantially complied with the law during five years, but before making proof she was married and went to live with her husband. Lawrence filed affidavit of contest, alleging abandonment, etc. It was held that, having complied with the law for five years she could make proof notwithstanding her marriage and living away from the land. The contest was dismissed, and the entrywoman allowed to make proof.

In the case at bar the entrywoman had substantially complied with the law prior to the expiration of the three years, and had water on the land, and on each subdivision thereof, except when, by the unlawful act of the plaintiff, it was cut off, and it will not do for the plaintiff to testify that she did not own any water right, for the decree of the court gives her a title to a one-third interest therein, and in the ditch, and the testimony of expert witnesses shows that this supply is ample to irrigate the three hundred and twenty acres.

The allegation of the contest affidavit has not been proven, and the contest is dismissed. Her entry segregates the land, and the application to homestead a part of it will be rejected. This leaves the matter of proof between the entrywoman and the government. Her proof will be returned and approved, as it is amply sufficient. The money will be accepted, and the final proof, with the papers relating to her delay, and the copy of the decree of the court, will be submitted to the board of equitable adjudication for consideration. Your decision is modified accordingly.

STATE OF CALIFORNIA ET AL. *v.* HERBERT.

Motion for review of departmental decision of December 3, 1893, 15 L. D., 519, denied by Secretary Smith, July 7, 1893.

RAILROAD GRANT—SETTLEMENT CLAIM.

The possession and occupancy of a tract by a qualified settler except the land covered thereby from the operation of this grant on the definite location of the road; and the subsequent failure of the claim ultimately asserted by such settler leaves the land open to the first legal applicant.

NORTHERN PACIFIC R. R. CO. *v.* KRANICH ET AL.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

I have considered the case of the Northern Pacific Railroad Company *v.* Ernest Kranich and William Hogan, on appeal by said company, and by said Kranich, from your decision of February 1, 1892, involving the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 23, T. 10 N., R. 4 W., in the Helena land district, Montana.

Said land lies within the primary or forty mile limits of the grant to the Northern Pacific Railroad Company made by the act of July 2, 1864 (13 Stat., 365).

By the third section of said act there was granted to said company every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, whenever on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office.

The line of road opposite the land in dispute was definitely located July 6, 1882. Ernest Kranich filed his declaratory statement (No. 7189) for the land July 24, 1885, alleging settlement thereon in April, 1879.

On April 14, 1886, William Hogan filed declaratory statement (No. 7659) for the land, alleging settlement the same date.

On April 6, 1886, Kranich gave notice of his intention to make final proof on May 14, 1886, at which time Hogan appeared and contested the claim of Kranich.

The case was tried and determined before the local officers, and came in regular course to this Department, and was decided April 22, 1891 (12 L. D., 384).

A hearing was directed to be ordered to allow Kranich "to show that he was in the actual possession and occupancy of the land at the date of definite location of the road," and you were directed, after an exam-

ination of the evidence, to pass upon the conflicting claims of the several parties "so that all matters in dispute may be determined by one judgment."

Under these instructions a hearing was had at the local office June 23, 1891, when all parties appeared and testimony was submitted. In July, 1891, the local officers found that on

July 6, 1882, Ernest Kranich, a qualified pre-emption or homestead claimant, was in possession of, occupying and cultivating the ground in controversy, though not residing thereon, with an intent to afterwards acquire title thereto under the settlement laws of the U. S., which intent he did, and is attempting to execute. Occupancy, possession, and cultivation on the date when the right of the road would otherwise attach, by one qualified to make entry under the settlement laws, coupled with an intent thereto, even though such person did not reside on the land is sufficient to except the land from the operation of the grant. *Northern Pac. Ry. Co. v. Sales* (11 L. D., 583).

On appeal, by letter of February 1, 1892, you rejected the application of Kranich to make final proof, because he had in October, 1885, removed from land of his own to reside on the land in question, which disqualified him as a pre-emptor under section 2260 of the Revised Statutes, although you affirmed the decision of the local officers that on July 6, 1882, he had such a claim to the land by settlement, possession and improvement, as excepted it from the operation of the grant to said railroad company. You therefore directed that Hogan should be permitted to perfect his claim to the land.

The first question presented by this record is whether or not Kranich had on July 6, 1882, such a "claim" to the land in dispute by possession and occupancy, as excepted it from the operation of the grant to said company, within the meaning of the third section of the granting act, above cited.

It appears from the evidence that Kranich had declared his intention to become a citizen in 1876, and became a full citizen in 1886. It further appears that he was qualified and had the right "to assert a claim" to the land in question on July 6, 1882, and that he did then assert a claim to said land by possession and occupation thereof, as found by the local officers and by yourself. It appears that he had never exhausted his rights under the homestead or pre-emption laws. His case comes therefore within the rulings of this Department in *Northern Pacific R. R. Co. v. Potter* (11 L. D., 531) and *Northern Pacific R. R. Co. v. Sales* (Idem, 583).

It follows that Kranich's "claim" had the effect to except this land from the operation of the grant to said company on July 6, 1882. *K. P. Ry. Co. v. Dunmeyer* (113 U. S., 629); *Northern Pacific R. R. Co. v. Patterson* (16 L. D., 343).

It appears further from the evidence that in October, 1885, he removed from land of his own to reside upon the land in question, which disqualified him then and there from acquiring "any right of pre-emption" to said land under section 2260 of the Revised Statutes.

The land therefore became subject to settlement and entry by the first legal applicant thereafter. Inasmuch as William Hogan made pre-emption filing on April 14, 1886, he may be permitted, if duly qualified, upon showing compliance with the law, to perfect his claim therefor.

Your judgment is affirmed.

You have also transmitted the papers in the appeal of Everett E. Slocum from the decision of the local officers rejecting his application to make homestead entry of said tract, tendered August 16, 1892; also his application to contest the right of said Hogan to said land.

Inasmuch as you have not passed upon the questions involved in said appeal, the papers relating thereto are herewith returned for your action thereon.

PRIVATE CLAIM—SURVEY—PATENT.

ANTOINE MARECHAL.

The Department is without jurisdiction to order a survey of a private claim where the land involved is embraced in a prior outstanding patent issued on the claim of another.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

With your letter of March 19, 1892, you transmit the record in the appeal of the representatives of Antoine Marechal from your decision of September 4, 1890, rejecting their application for the survey of lands in the city of St. Louis, Missouri, which they allege were confirmed to Antoine Marechal's legal representatives in 1825, by Recorder Hunt, under the acts of Congress of June 13, 1812 (2 Stat., 748), and May 26, 1824 (4 Stat., 65).

The location of the land claimed to have been confirmed as above stated is described as a tract containing one arpen front by forty arpens in depth, situated in the Cul de Sac of the Grand Prairie of the city of St. Louis, Missouri, and bounded, north by the field lot claimed by Jacques Marechal's legal representatives, south by a lot not possessed at that time, east by vacant land, and west by the claim of Gratiot.

You declined to survey any lands at the point designated by applicants, for the reasons:

1st. Because I am unable by the evidence to locate the land which it is alleged that Jacques Marechal occupied, there being no land immediately upon the north of where its location is now claimed which was held or cultivated by Calve.

2d. Because all the title which the government had to lands within survey 2498, so far as said lands were public lands, was granted to Mary McRee by patent in 1862.

3d. Because this office has no jurisdiction in the premises, either to survey or otherwise adjudicate questions of title or location of any lands falling within said sur-

vey 2498, having been fully deprived thereof, by the act of 1874, if the same had not been exhausted by the issuance of said patent to Mary McRee in 1862.

4th. Because the parties now applying for a survey have slept too long on their rights, without protesting or objecting to the survey and disposal of the lands in question by the government to other parties.

Conceding that the land designated in the confirmation to Antoine Marechal's representatives is capable of being located, I can not see by what authority the government can make an official survey of the alleged claim, for the reason that the claim as located by the applicants is covered by the official survey of the New Madrid location, made in 1818, in the name of James Y. O'Carroll, and for which patent was issued by the United States under date of June 10, 1862, to Mary McRee, as assignee of James Y. O'Carroll.

It can not be successfully contended that the government has not passed by the patent all title that it had to the land in controversy, and that so long as that patent remains outstanding, there is no authority in the government to dispose of the land covered by said patent. The applicants, however, ask that the claim may be located and established by the government survey, so that they may have the necessary status to entitle them to adjudicate their rights in the courts. When the government made the official survey of the New Madrid location in the name of James Y. O'Carroll, and issued patent therefor to his assignees, it was an adjudication that the land covered thereby was a part of the public domain. Having no jurisdiction over the land for any purpose, I can see no authority to make an official survey of any part thereof, and I therefore affirm your decision rejecting the application.

RAILROAD GRANT—SCHOOL INDEMNITY SELECTION.

UNION PACIFIC RY. CO. v. UNITED STATES.

A school indemnity selection, made prior to statutory authority therefor, does not reserve the land so selected from the operation of a railroad grant on definite location of the road.

The case of *Fitch v. Sioux City and Pacific R. R. Co.* overruled.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

I have considered the case of *The Union Pacific Ry. Co. v. The United States*, on appeal by the former, from your decision of March 12, 1892, rejecting its application for patent for, and cancelling its "selection" of the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 3, T. 12 N., R. 11 E., Neligh, Nebraska, land district.

It appears of record that this land is within the limits of the grant, by act of July 2, 1864, (13 Stat., 356) for the Union Pacific Railway Company: that its right attached, if at all, on filing map of definite location October 24, 1864.

This tract was listed June 12, 1881, per list No. 4, but was omitted from the patent issued to the company June 15, 1882, which included other tracts embraced in said list. It further appears that the territorial officers selected for school purposes a tract of land embracing this in controversy, in lieu of a deficiency in sections 16 and 36 of T. 12 N., R. 11 E., and 16 and 36, T. 17 N., R. 12 E. This selection was made July 1, 1858, and was cancelled July 2, 1880. You say:

The facts in this case appear to be identical with those of the case of Wm. R. Fitch v. Sioux City and Pacific R. R., decided by the Department March 21, 1891, (not reported) wherein it was held, on the authority of the cases therein cited, that the school indemnity selection, subsisting at the date said grant attached, excepted the tract in question from the operation of the same.

You rejected the application for patent, and canceled the "selection," from which action the company appealed.

In the case at bar there is no adverse claimant. The selection by the territorial officers having been canceled, and no appeal having been taken, so far as appears, any claim it may have had is, as to it, closed.

In the Fitch case cited, (L. and R. Press Copy 216, p. 184) it was said that:

It appears from the records of your office that on July 3, 1857, one, Duncan McLachlen filed a declaratory statement for the entire SW. $\frac{1}{4}$ of said section 29, alleging settlement June 3, 1857. This filing is still intact on the records. As this filing was subsisting and *prima facie* valid at the date the company's rights attached, it served to except the W. $\frac{1}{2}$ of said SW. $\frac{1}{4}$ from the operation of the grant to the railroad company.

It is well settled that a *prima facie* valid filing, or entry of record at the time a grant becomes operative, excepts the tract so filed upon or entered, from the operation of the grant, but such is not the state of facts in the case at bar.

It is true, in the Fitch case your office held that the tract was excepted by the school selection which was made July 1, 1858, but it appears that the departmental decision was on the other ground which was tenable.

It is also true that in the latter part of the departmental decision it was said that the school selection excepted it from the grant, and several cases are cited in support of the decision. I have examined them carefully, and do not find either of them in support of the latter branch of the decision. In *Call v. Southern Pacific R. R. Co.* (11 L. D., 49), the selection was made in 1870, under the act of February 26, 1859, (11 Stat., 385). In *Southern Pacific R. R. Co. v. State of California* (4 L. D., 579), it is stated that the tract was in a *prima facie* valid selection. This pre-supposes that it was made when the law authorized it, although the date is not given, and seems to have been considered of no importance in that case. In the case of *Southern Pacific R. R. Co. v. State of California* (3 L. D., 88), the selection was made in 1867, and therefore authorized. In case of the *Northern Pacific R. R. Co. v. Bowman* (7 L. D., 238), it was found that the tract was occupied, and was being

cultivated and improved by a qualified entryman at the time the grant took effect, and it was held that such settlement, occupancy, cultivation and improvement excepted the tract from the grant.

In *Southern Pacific R. R. Co. v. Bryant* (on review) (3 L. D., 501), the tract was selected in lieu of school lands lost in place, in 1879, so it may be safely said that neither of the authorities cited tends in the least to support the second branch of the decision in the *Fitch* case, nor your decision in the case at bar.

There never was but one attempted selection of this land in controversy, that was at a time when there was no authority of law for any selection.

The 16th section of the act of Congress, organizing the Territory of Nebraska, (approved May 30, 1854, 10 Stat., 277) reserved from sale sections sixteen and thirty-six, in each township for school purposes, but it made no provision for the selection of land in lieu of any such sections being wanting in fractional townships, or being pre-empted, or in any way disposed of. To meet this, and make good the school lands to the several townships, the act of February 26, 1859, (11 Stat., 385) was passed, authorizing, generally, State and Territorial authorities to select other lands, where section sixteen or thirty-six has been pre-empted, or is wanting in fractional townships, or from any natural cause.

Prior to this act there was no authority for any selection, and the Territorial or State officers' selection was as invalid and void as would have been a list of lands made by any other person having no authority.

In *Hahn v. Union Pacific R. R. Co.* (Copp's Public Land Laws, Vol. 2, 961) the case arose in Nebraska. The State selected a tract of land on July 1, 1858, as indemnity for a deficiency in the lands reserved for school purposes. Secretary Schurz said, if this selection was valid it excepted the tract from the operation of the grant, by reason of subsisting thereon at the date of the grant, and after fully considering the case, he held that the act of May 20, 1826, (4 Stat., 179) "Conferred upon the Territory neither authority to make such selection, nor right to indemnity for such deficiency." He says that if the Territory or State, after its admission into the Union, had ratified the selection, it might have been held valid from and after the act of 1859; this was not done, and he concludes:

The selection of 1858 cannot, therefore, be held as valid, and it did not reserve the tract so as to take it out of the operation of the grant to said company.

On July 2, 1880, Acting Commissioner Holcomb, in pursuance of this decision of June 25, 1880, wrote to the register and receiver at Norfolk, Nebraska, land office, directed the cancellation of certain selections, and stated that the lands inured to the company, and directed that Davis, land commissioner of the company, be notified.

I find no decision reversing or modifying that cited above, and believe that it was founded on correct principles. The unauthorized

selection was invalid, not voidable, but absolutely void *ab initio*, and could not except the land from the grant.

Your decision is therefore reversed, and in so far as the decision in *Sioux City and Pacific R. R. Co. v. Wm. R. Fitch, supra*, is in conflict with the decision, the same is overruled.

As there is no adverse claim to the land, the claim of the State having been cancelled in 1880, patent will issue in accordance with the law and regulations in such cases made and provided.

OKLAHOMA LANDS—SECOND HOMESTEAD.

JAMES M. CLARK.

The provisions in section 7, act of February 13, 1891, allowing an entry of lands ceded by the Sac and Fox Nation and Iowa tribe of Indians, to be made by persons who had previously commuted a homestead entry, apply only to entries perfected under section 2301 R. S., and have no reference to entries commuted under the special provisions of section 21, act of May 2, 1890.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 7, 1893.

I have considered the appeal of James M. Clark involving his application to enter the NW. $\frac{1}{4}$ of Sec. 24, T. 17 N., R. 5 E., Guthrie land district, Oklahoma.

It appears from the record in this case that Clark made a homestead entry for the SW. $\frac{1}{4}$ of section 17, T. 17 N., R. 2 W., August 6, 1889, and perfected the same September 10, 1890, by purchase under section 21, act of May 2, 1890 (26 Stat., 81-91). On October 2, 1891, Clark filed in the local office application to make another homestead entry for the tract first above described under the act of February 13, 1891 (26 Stat., 749-759), which was rejected by the local officers, practically on the ground that the applicant had exhausted his right and was not entitled to make a second entry, whereupon he appealed and under date of June 22, 1892, you sustained the action of the register and receiver, and Clark again appealed. Section 21, act of May 2, 1890, *supra*, provides that any person who is entitled to make a homestead entry in the Territory of Oklahoma, and who has complied with all the laws relating to such homestead settlement, may receive a patent for the land so entered at the expiration of twelve months from date of locating upon said homestead upon payment to the United States of \$1.25 per acre for the land embraced in such homestead.

Section 7, act of February 13, 1891, *supra*, upon which Clark relies as authority for allowing him to make another entry, provides, in relation to the lands ceded by the Sac and Fox Nation and Iowa tribe of Indians,

that they shall be disposed of to actual settlers only under the provisions of the homestead laws, except section 2301, which shall not apply: *Provided*, however,

That each settler, under and in accordance with the provisions of the homestead laws, shall before receiving a patent for his homestead, pay to the United States for the land so taken by him, in addition to the fees provided by law, the sum of \$1.25 for each acre thereof and any person otherwise qualified who has attempted to but for any cause failed to secure title in fee to a homestead under existing law, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make a homestead entry upon any of said lands.

Section 2301 Revised Statutes, provides: That if a homestead settler does not wish from any cause to remain five years on his homestead entry he may pay for it at the legal price per acre. Such commutation payment takes the place of the residence and cultivation of the land that would otherwise be required of the settler. In cases under said act of May 2, 1890, however, the conditions and requirements are different; the settler being required to make proof of residence and cultivation of the tract for one year and to make payment of a sum per acre, equal to the amount paid for the relinquishment of the Indian title but in no case shall such payment be less than \$1.25 per acre.

Under this last mentioned act, Clark perfected his former entry which can not be considered a commutation similar to that prescribed under section 2301 Revised Statutes, and therefore covered by the provision in the act of 1891, allowing a second entry.

The clause in said act of 1891, allowing an entry of those lands to be made by any person who had formerly commuted an entry, is held to relate entirely to entries perfected under section 2301 Revised Statutes, as above quoted and can have no reference whatever to entries perfected under the special provisions of said act of 1890.

Your decision is accordingly affirmed.

It appears that since the appeal of Clark was filed in this Department, one Riley A. Grindstaff applied to enter the tract in dispute, but the local officers, on account of the pending appeal of Clark, rejected the application, whereupon the applicant appealed, and you transmitted the same to this Department without action. The case of Clark having been disposed of, the appeal of Grindstaff, as also the motion of Clark to dismiss Grindstaff's appeal from the local officers, are returned for appropriate action and the papers in the Clark case transmitted with your letter dated October 3, 1892, are also herewith returned.

TRANSFEREE—CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

RADABAUGH *v.* HORTON.

When the attention of the Department is called to the fact that the interest of a mortgagee is involved in a pending contest, notice should be given said mortgagee of the departmental decision therein, and, in the absence of such notice, an order of cancellation does not defeat the right of the mortgagee to be heard. The Department is without jurisdiction to try and determine a contest initiated after a transfer of the land, in the case of an entry that is within the confirmatory provisions of section 7, act of March 3, 1891.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

In the consideration of the motion for review of the above entitled cause, filed by counsel for W. M. Shaver, receiver, etc., and Sarah A. Edwards, mortgagees, I find the following facts:

On October 5, 1878, Raughley Horton made timber-culture entry of the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 30, T. 22 S., R. 2 E., Wichita, Kansas, land district, and on October 16, 1886, he offered final proof, and final certificate issued the same day. On June 13, 1887, Carlton C. Radabaugh filed an affidavit of contest alleging non compliance with the law in the production of the required number of trees. A hearing was ordered, at which both parties appeared and on November 30, 1887, the local officers held that the entry should be canceled. On appeal you affirmed their decision September 27, 1889. The defendant again appealed and by departmental decision of June 11, 1891 (unreported), your decision was affirmed.

On October 5, 1892, W. M. Shaver, receiver of the International Bank of Newton, Kansas, and Sarah A. Edwards, filed a motion for review. This motion is supported by their affidavits showing that Raughley Horton on June 1, 1887, and after final entry of said tract, made, executed and delivered to said International Bank two mortgages on said land to secure the payment of two promissory notes, one of \$1200, and the other for \$60; that on June 14, following, the \$1200 note and mortgage were transferred to said Sarah A. Edwards who still owns the same, and that the \$60 note and mortgage is in the possession of said receiver as part of the assets of said bank; that said notes are unpaid and the mortgages have not been released. Certified copies of the mortgages are filed with the motion by which it is shown that they were executed June 9, 1887, and filed for record June 10, following.

It is stated in the motion that "the attention of the land department" was brought to the fact that the said International bank had an interest in the subject matter of the controversy, and

Your petitioners further show that afterward on, to wit, June 11, 1891, without bringing the said mortgagee, whose interest was thus spread upon the record, before

you, and affording him an opportunity to be heard in behalf of his said interest, and without any notice whatever to such party in interest, of any of the proceedings in the cause, you rendered a final decision in the premises, sustaining the Commissioner of the General Land Office, and directing the cancellation of the said entry.

That the mortgagee, the International Bank of Newton, Kansas, was never notified of such departmental decision.

That on September 9, 1891, the said entry was canceled.

That notice of the cancellation was never served upon the International Bank of Newton, Kansas.

That your petitioner, the receiver of the said bank, did not learn of the departmental decision until after the cancellation as aforesaid, and long after the time limited for filing a motion for review had expired.

Errors in said departmental decision are assigned as follows:

1. Error was committed in taking any action in case, adverse to the entry, after the interest of the mortgagee was spread upon the record, in the absence of notice to such interested party.

2. Error was committed in rendering a final decision and closing case without notice to the mortgagee, whose interest was disclosed upon the record.

3. Error was committed in the failure to serve the International Bank of Newton, Kansas, with notice of the final decision cancelling the entry when the fact of the mortgage interest of said bank was a part of the record in the case.

4. Error was committed in the failure to serve the mortgagee with notice of the cancellation of the entry, when the fact of such mortgage interest was a part of the record in the case.

5. Error was committed in rendering a final decision in the cause without regard to the fact that the record presented a case which *prima facie* fell within the provisions of section seven of the act of March 3, 1891.

6. Error was committed in not suspending final action in the case and directing that an opportunity be given the mortgagee, to show himself entitled to have the entry confirmed under the provisions of section seven of the act of March 3, 1891.

Counsel for Radabaugh has filed a motion to dismiss the motion for review on the grounds

1. That said W. M. Shaver and Sarah A. Edwards are not co-partners or jointly interested in the notes and mortgages they claim to hold, neither have they any interest in common in the result of their said application and motion.

2. A transferee who fails to file with the local office a statement of his interest in the land is not entitled to plead want of notice

3. A purchaser after entry and before patent takes only an equity—and is charged with notice of all defects in the title

It is important to bear in mind the prominent dates detailed above, that is, that final entry of the land was made October 16, 1886; the mortgage was recorded June 10, 1887; and the contest was filed June 13, 1887. It is not shown by the record that the mortgagee had any notice of any of the proceedings under the contest. In fact the record does not disclose that the existence of the mortgagees was known to either the land officers or yourself. After Horton, however, had taken his appeal from your decision to this department, the attorney for contestant, filed here a motion to dismiss the said appeal for the reason "that the said defendant had no right to or interest in and to the lands and appurtenances involved in this suit," and in support of the motion filed a certified copy of a warranty deed from Horton and wife

to one Grouzeland, for the land, executed on October 19, 1888. In said deed is the following recital:

This conveyance is made subject to two mortgages executed by parties of the first part to the International bank of Newton, Kansas, dated June 1st, 1886 (1887) recorded in office of the register of deeds of Harvey county, Kansas, in book 10, of mortgages at page 240, and book 7 of mortgages at page 482, in the amounts of \$1200 and \$60, with accrued and accruing interest.

And the grantors warrant the title "except under said mortgages above described to which this conveyance is made subject."

It is insisted by counsel that profert of this deed thus made was sufficient in itself to cause the Department to serve notice on the mortgagee of its action in cancelling Horton's entry thereby permitting it to show its right to ask for a confirmation of the same under the act of March 3, 1891 (26 Stat., 1095).

I am disposed to think that this position of counsel is correct, and that the Department when its attention was called to the fact of the existence of the mortgage should have directed notice to be given to the mortgagee, of its decision. In the case of *United States v. Newman et al.* (15 L. D., 1224), it was said:

A transferee, when his interest is made known, has always been allowed to show that the entryman has complied with the law, and in a case like this, I think that the mortgagee may properly be deemed the party in interest and should be given all the rights of a transferee.

In that case the attention of yourself and the local officers had been called to the interest of the transferee simply by the introduction in evidence of abstracts of title to the land. It was further held that not having received notice of any of the proceedings or the judgments pronounced "it can not be held bound by the judgment canceling these entries and the judgment canceling the same did not dispose of the company's rights." In view of the facts therefore, I am disposed to believe that this motion should be considered as having been filed within time.

I am also impressed with the fact that it was error to cancel the entry of Horton until an opportunity was given the mortgagees to show their interest in the land. As the record stood when under consideration in this Department, it was insufficient to order a confirmation under the act of March 3, 1891, but sufficient was shown to require a further investigation as to the transfer. Section 7 of said act provides, among other things,

And all entries made under the pre-emption, homestead, desert-land or timber-culture law, in which final proof and payment may have been made and certificates issued and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to bona fide purchasers, or incumbrances for a valuable consideration, shall, unless upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or incumbrance.

Under this law I take it that where there has been a compliance with it, the Department has no jurisdiction to try and determine a contest initiated after the transfer of the land. Congress, by this act, confirmed those entries that came within its provisions, and all we can do in a given case, is to determine whether or not the entry under consideration falls within the purview of the statute. It matters not whether our attention is called to the matter by counsel, if there is sufficient in the record to charge us with notice that the entry is one that should be confirmed, it should be done. *Nawrath v. Lyons et al.* (16 L. D., 46).

Sufficient evidence is now before me, on this motion for review, to satisfy me that the entry of Horton should be confirmed. The land was encumbered prior to March 1, 1888, and before the contest was initiated and the mortgages remain unsatisfied; there were no adverse claims which originated prior to final entry; it is alleged that the encumbrance is *bona fide* and no fraud has been found by a government agent.

The fact that the entryman did not fully comply with the law in the planting of trees will not defeat the confirmation of his entry, where it is shown that there is a *bona fide* encumbrance. (*Wonder v. Brun*, 15 L. D., 507).

For the reasons given, I am of the opinion that the motion to dismiss filed by counsel for the contestant should be denied, and the motion for review should prevail; that the said departmental decision of June 11, 1891, ordering the cancellation of Horton's entry, should be revoked, the said entry should be reinstated, and, if any subsequent entry has been made of the tract in controversy, the entryman should be notified and given an opportunity to show cause why his entry should not be canceled.

OKLAHOMA LANDS—SALE OF CEDED LANDS.

CIRCULAR.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

By letter of June 8, 1893, you submitted the circular of instructions as to payments required of settlers upon the lands in Oklahoma, ceded by the Pottawatomie, the Absentee Shawnee and the Cheyenne and Arapahoe Indians, modified in accordance with the suggestions made in departmental letter of June 2, and the same is herewith returned with my approval.

You state that the provision as to notice to the entryman, in case of default, was not incorporated in the original draught because it had been represented to you that owing to failure of crops, many of these

settlers will not be in position to meet the payments, and that it is proposed to make an effort to obtain through Congress an extension of time for said payments. This is a proper requirement, but if Congress shall take action, a change of regulations may become necessary, or if conditions shall develop that show the necessity for such action, this requirement may perhaps be modified or suspended.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 8, 1893.

REGISTERS AND RECEIVERS,

Kingfisher and Oklahoma, Oklahoma Territory:

GENTLEMEN: Your attention is called to the provisions of section 16, of the act of March 3, 1891 (26 Stat., p. 1026) relating to the disposal of the lands ceded by the Citizen Band of Pottawatomie, the Absentee Shawnee, and the Cheyenne and Arapahoe Indians, "That each settler on said lands shall, before making a final proof and receiving a certificate of entry, pay to the United States for the lands so taken by him, in addition to the fees provided by law, and within five years from the date of the first original entry, the sum of \$1.50 per acre, one-half of which shall be paid within two years."

Cash receipts will be issued for the purchase money paid under said provision, according to form attached (4-140a.), and when final proof and payment are made a final homestead certificate (form 4-196), and a final homestead receipt for the final commissions (form 4-140) will be issued in addition to a cash receipt (form 4-140a.) for the final payment.

The cash receipts will bear the regular cash series of numbers, and the money will be reported on the regular abstract of cash sales with a marginal reference to the homestead entry by number upon which the payment is made. Said receipts will be issued in duplicate and the duplicate given to the party as in ordinary cash sales.

In case of default in making any payment when due, you will notify the entryman of that fact, and that if the payment shall not be made within sixty days thereafter, steps will be taken looking to the cancellation of the entry. Upon the expiration of the time allowed by such notice, you will report the status of the entry to this office for appropriate action.

Should any party tender the money required to be paid for said lands after the time it is due and before final cancellation of the entry, you will receive the same and make report thereof by special letter to this office. See Edward Uhlig, 12 L. D., 111.

The mere fact that a party has not paid the purchase money within the prescribed time should not be regarded as sufficient ground upon which to base a contest where there is no allegation of failure to comply with the settlement and cultivation requirements of the law.

Very respectfully,

EDW. A. BOWERS,
Acting Commissioner.

Approved,
HOKE SMITH,
Secretary.

SECOND CONTESTANT—TIMBER CULTURE APPLICATION—PRACTICE.

CHARLES S. PHILLIPS.

The right of a second contestant to proceed with his suit, on the dismissal of the prior contest, can not be defeated by the intervening contest and entry of another, allowed without notice to the second contestant that the first contest had been dismissed.

A timber culture application filed with an affidavit of contest prior to the repeal of the timber culture law saves the right of the applicant to perfect his entry after said repeal, if the entry under contest is finally canceled.

Affidavits filed for the purpose of supplying an omission in the records of the local office, may be accepted on sufficient showing as the basis of a further hearing in the case.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

I have considered the motion for review of departmental decision of October 17, 1892, (unreported), in the case of Charles S. Phillips, *ex parte*, involving the NE. $\frac{1}{4}$ of Sec. 13, T. 7 S., R. 40 W., Oberlin, Kansas.

The facts necessary to a determination of the motion are as follows:

October 23, 1888, John Duncan made timber-culture entry for this land.

October 25, 1889, one H. H. Smith filed a contest against the entry, upon which a hearing was finally ordered for June 27, 1890.

Prior to the last date, to wit, April 17, 1890, Charles S. Phillips, complainant in the motion herein, also filed a contest affidavit against said entry, which was held to await the result of Smith's prior contest. October 24, 1890, after two continuances, Smith's contest was dismissed for want of prosecution. Smith failed to appeal, but Phillips was not notified of the dismissal of the prior contest of Smith, and, on November 3, 1890, ten days after Smith's contest was dismissed, one Robert B. Smith filed an affidavit of contest against the same entry, and was erroneously allowed to prosecute the same in disregard of the contest of Phillips, then pending.

On this contest of Robert B. Smith, the entry was canceled, July 13, 1891, and on the 31st of the same month, one Willard Smith was allowed to make homestead entry for the same.

August 18, 1891, Phillips applied to make timber-culture entry for the same land. He accompanied his application with his own affidavit, corroborated by G. M. Phillips and M. Brown, stating the fact of his application to contest and tender of one dollar contest fee, which was refused because of then pending contest of H. H. Smith, but that his contest was received at the office and placed on file to await the result of the prior contest of Smith; that he was told that if Smith's contest should be dismissed, he (Phillips) would be duly notified of it; that he was never notified, etc. He also states in said affidavit that at

the time he filed his application to contest, he also filed an application to enter the land under the timber-culture law, which application was properly verified, etc.

This application was denied by the local officers, "for the reason that said tract is segregated by H. E. No. 14,248 made July 31, 1891 and for the further reason that the T. C. law was repealed by the act of March 3, 1891."

Phillips appealed, and by letter of October 22, 1891, you sustained the action of the local office, and by decision of this Department, heretofore noted, your judgment was affirmed, on the ground that prior to his application to enter, the timber culture law had been repealed by the act of March 3, 1891 (26 Stat., 1095), and the case of August W. Hendrickson (13 L. D., 169) cited as authority therefor.

In that case it is held that, if a timber culture claim had been lawfully initiated before the passage of the act of March 3, 1891, the claim could be perfected, notwithstanding the repeal of the timber culture law. In said case it is further held that a claim is lawfully initiated when "one who is qualified to enter makes written application, accompanied with the requisite amount of fees, to enter land that is subject to entry," citing *R. H. Trusdle*, 2 L. D., 275, and *Whitmore v. Tufts*, id., 278 (see bottom page 171, *et seq.*)

The record before me contains the corroborated affidavit of Phillips, as before mentioned, to the effect that his contest affidavit was accompanied by an application to enter. This was before your predecessor when his decision was rendered, in which this corroborated affidavit was designated as an "uncorroborated statement," which could not be accepted as evidence against the records of the local office.

The record of the local office, it is true, failed to show that Phillips filed an application to enter with his contest affidavit, but this failure to make a record of the same is, it seems to me, very satisfactorily explained by the affidavit of C. C. Perdieu, filed in the local office January 26, 1892, and now before me. He states therein that he is, and has been for years, a practicing attorney before the United States land office at Oberlin; has had many contest cases, some with applications to enter, and has seen the clerk detach the applications and throw them into the waste basket, "stating to the applicant that it was not necessary to file applications to enter the land with the contest;" and that at other times, when he filed contests with applications to enter, the officer "marked the application 'filed' on the back of the application, but "made no record on the docket or elsewhere of the filing of the same." He further states in his said affidavit, positively, and of his own knowledge, that Phillips, on or about the 17th day of April, 1890, made and filed an application in the Oberlin office to enter said tract of land.

These affidavits were all before this Department when the decision affirming the judgment of your office was rendered, but they seem to have been overlooked by the writer of the opinion, he, doubtless, rely-

ing upon the record made by your predecessor, in which it is stated that the "uncorroborated statement" of the claimant was alone relied upon to impeach the record of the local office.

These affidavits are not filed for the purpose of contradicting the record of the local office, but for supplying an omission therein. The register and receiver, in their report of the proceedings in this case, state that:

Having examined the records of this office, we fail to find any record of an application filed by the said Phillips to make T. C. E.

It is not stated by the local officers that it was their practice to make a record of applications to enter which were filed with contest affidavits; and, when it is remembered that at the date of these proceedings it was not necessary to file an application to enter with a contest in order to make a timber-culture entry, in the event of the contest being successful, it is not improbable that Phillips's application was treated after the manner of others, as described in the affidavit of Perdue.

Under the rule of practice, as laid down in the case of *Mallet v. Johnston et al.*, 14 L. D., 658 (see page 661), a *prima-facie* case is clearly made out by these several affidavits, and a hearing should have been ordered to more clearly determine the rights of the claimants herein.

The contest of Robert B. Smith, upon which the entry was canceled, was improperly allowed as against the prior right of Phillips; the homestead entry of Willard Smith was also in contravention of the rights of Phillips; and both the said contest of Robert Smith and the said entry of Willard Smith were made with notice of Phillips's prior rights. (See *Carlson v. Bradley*, 12 L. D., 525.)

The decision of this Department, heretofore rendered, is therefore set aside, and held for naught.

Inasmuch as Duncan had not appealed from the action of the local officers in canceling his timber-culture entry, it will be taken for granted that the proof offered by Robert H. Smith was sufficient to warrant such action, and it will therefore not be disturbed.

You will direct that notice be served upon Willard Smith, the homestead entryman, calling upon him, with notice to Phillips, to show cause within a reasonable time why his entry should not be canceled, and Phillips allowed to make entry of the land in the exercise of his preference right.

Upon report to you by the local officers of the proceedings had upon such action, you will take appropriate action according to the views herein expressed. If Smith should upon proper notice fail or refuse to take such action within the time by you designated, you will direct that his homestead entry be canceled, and Phillips allowed to make entry thereof under the homestead or timber-culture law, if he has the necessary qualifications.

PRIVATE CLAIM—SCRIP—SUCCESSION SALE.

SYLVESTER BOSSIER.

If the necessary jurisdictional facts appear on the face of succession proceedings, a purchaser, at a sale thereunder, is not bound to inquire into the truth of the allegations on which the court assumed jurisdiction; nor is the validity of such proceedings subject to collateral attack on the application of such a purchaser for the issue of scrip under a private claim so purchased.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

I have considered the appeal filed on behalf of the heirs of Sylvester Bossie, from your decision of April 13, 1892, holding that the scrip in this case, when approved under the act of June 2, 1858, inures to the benefit of the party who purchased the claim at a "succession sale," in Louisiana, and not to the heirs of Bossie.

The private land claim made the basis of the scrip in question, in the name of Sylvester Bossier (or Bossie), is entered as No. 11 "B," in the report of the Commissioners for the western district of Louisiana, dated May 4, 1815, for eight hundred arpens of land in the county of Natchitoches, under an order of survey, bearing date of April 18, 1789.

This claim conflicted with that of one Louis Metoya, under an order of survey made in 1794, upon which certificate No. 1953 "B" was issued by the board of commissioners, and this land was at an early day patented to Metoya.

Bossie's claim was, however, unqualifiedly confirmed by the act of Congress approved April 29, 1816 (3 Stat., 328), and scrip was prepared by the surveyor-general of Louisiana, under the act of June 2, 1858, and forwarded to your office, with Surveyor-General Brewster's report of October 1, 1877, being as follows:

I have the honor to transmit herewith for your official action thereon the following described certificates of location issued by me this day under the provisions of the third section of the act of Congress approved June 2d, 1858, to wit:

Certificate Nos. 388 "A" and 388 "B" for one hundred and sixty acres each, and certificate No. 388 "C" for three hundred and sixty $\frac{56}{100}$ acres, three certificates aggregating six hundred and eighty $\frac{56}{100}$ acres.

I have issued said certificates in full satisfaction of the confirmed but unlocated private land claim of Sylvester Bossier or Bossie entered in the report of the Commissioners on claims to land in the county of Natchitoches, dated May 4, 1815, and numbered 11 of class "B" in said report.

I have to state that I have made a careful and complete examination of the report on said claim published in the American State Papers, Vol. 3, pages 73 & 75, as well as other documents relating to the said Bossier, and his claim, and have examined the act of Congress approved April 29th, 1816, in connection therewith, and I am satisfied that the said claim is confirmed.

I have also examined the field notes of the public surveys, abstracts of private land claims, township maps, etc., and I am convinced that said claim has never been located or otherwise satisfied in whole or in part.

The land embraced in the claim of Sylvester Bossier was also claimed by Louis Metoya. The former under an order of survey and settlement of 1789, the latter some kind of title of 1794.

Metoyer seems to have pushed his claim to a confirmation before the board of commissioners as certificate of confirmation No. "B" 1853, was issued to him on the 13th of April, 1812, and the following year the land was surveyed and the claim located.

Bossier appears to have postponed until a later date his application for confirmation, and the commissioners, after consideration, concluded not to issue a second certificate covering the same land, but to report the claim of Sylvester Bossier with their recommendation. I hesitated some time to issue certificates for this claim as the recommendation of the commissioners seemed to limit the claimant to a question of right to be determined by law.

It, however, appears that Bossier's claim was never located and never shown on the maps of public surveys, and that he was never able to test that question of right to the land by any legal process.

On the 19th day of October, 1872, William H. Robinson, the legal representative of the confirmee to this claim, filed his application, accompanied with evidence of his authority to do so, in this office, asking for certificates of location in satisfaction thereof, and my attention having been recently called thereto, I have in justice to him and in conformity with the law issued said certificates and recommend their authentication by you.

June 6, 1879, you submitted the case to this Department for instructions, the matter being considered in departmental communication of July 24, 1879, which, after stating the facts, concluded as follows:

You decline to approve the certificate on the ground that the confirmation was qualified by the recommendation of the commissioners that the claimant be left under it to adjudicate or contest with the opposing claimant.

Much as I might desire to prevent what appears on its face to be a double satisfaction of settlement claims, to the same land, I can not avoid the force of the direct confirmation of this claim by Congress, with the same record in its possession or accessible to it, that is now before me.

If a mistake was made, the language of the act of 1858 seems expressly directed to assume the entire responsibility, and provides for the issue of scrip if the claim, in whole or in part, has not been located or satisfied "for any reason, whatever, other than in discovery of fraud in such claim subsequent to such confirmation."

I am, therefore, of the opinion that the certificates may be authenticated upon a full affirmative showing that no successful proceedings were ever had for the recovery from Metoya of the land, or any portion thereof, patented to the latter, and comprising the original claim confirmed to each. (G. L. O. Rep't, 1879, p. 218.)

On April 29, 1891, W. A. Coulter, as attorney for D. J. Wedge, made application for the approval of the scrip, and filed certain certificates of the clerk of the court of the 11th judicial district, parish of Natchitoches, acting in the capacity of recorder of deeds *ex officio* in and for said parish, from a consideration of which you state that:

This evidence, I am of opinion, is conclusive of the case under the Hon. Secretary's instructions; and necessitates the approval and delivery of the scrip in satisfaction of the confirmed, but unsatisfied claim of Bossie.

His succession was opened in the court of Catahoula parish, La., and the inchoate claim No. 11 "B" was purchased by Wm. H. Robinson, October 4, 1872.

In the year 1833 Mrs. Hattie H. Morse, of this city, claiming to be a granddaughter of Sylvester Bossier, filed a protest in this office against the delivery of the scrip to Wm. H. Robinson, or his vendees, whose title was derived under said succession sale.

• February 26, 1891, Messrs. Rob't B. and Geo. Lines, of New Orleans, La., entered appearance for the heirs of Bossier, protesting against the delivery of the scrip to Robinson or his successors in interest; filing powers of attorney from numerous alleged heirs of the said confirmee, and other papers in connection with the case.

After a careful consideration of the questions involved, in connection with the departmental decision in the case of "Lettrieux Alrio" (5 L. D., 158), and the case of "Simmons v. Saul" and cases therein cited (reported in 138 U. S.), I am of opinion, and so decide, that it is the duty of this office to deliver the approved certificates to the present claimant under the aforesaid succession sale.

The protestants (alleged collateral or direct heirs of Sylvester Bossie) can not, under existing decisions, attack said proceedings, here, *collaterally*; but only in a *direct proceeding* in the court where jurisdiction of the estate of Bossie was assumed, and the property sold.

These protestants can, if they so desire, pursue the scrip after it is authenticated, and delivered; but the duty of approving and delivering the scrip as indicated above, can not be evaded by this office, on account of protests of parties whose alleged interests in the original claim have been passed upon and adjudicated under the laws of the State of Louisiana.

If those laws have been improperly administered in the present case, the remedy must be sought in the courts, and can not properly be applied by the executive branch of the government.

It is from this decision that the appeal is taken.

Said appeal was not served upon W. A. Coulter, who as before stated, filed papers necessary to complete the record and requested the approval of the scrip, until long after the time allowed by the rules of practice, within which the appeal must be served and filed, and for this reason motion is filed by said Coulter to dismiss the same.

Coulter's first appearance in this case was as attorney for D. J. Wedge, but Wedge's interest in the matter is not disclosed by the record before me. In the motion to dismiss he signs as "attorney for Wm. H. Robinson, legal representative of Sylvester Bossier."

The records of your office show that Robinson died many years ago, and that his succession was opened in 1891, but his right to this scrip is not mentioned in that proceeding.

If Coulter had authority to represent Robinson, the same ceased with his death, and, as the records fail to show any interest in Wedge, whom he also claims to represent, I must refuse to entertain the motion to dismiss.

The appeal having been filed out of time, might be dismissed *sua sponte*, but, as it is represented that the case involves some important principles of administrative law relative to rights of claimants to scrip under "succession sales," and, as the case has been orally presented at some length, I have decided to consider the questions presented.

In the present case, the succession of Bossier was opened in Catahoula parish in 1872 by the district attorney *pro tem*, and under the sale Robinson purchased the right to the scrip in question, the petition alleging as follows: "Sylvester Bossie departed this life in this Parish many years since, leaving some property consisting of an old defined, private, unlocated land claim said estate being less than \$500

in value wherefore he prays that he be ordered to take charge of said estate;" that a commission issue to make an inventory; that the property inventoried be sold according to law to pay debts, etc.

It is alleged, however, and the affidavits tend to show, that Bossie was domiciled and died in Natchitoches parish, and not in Catahoula parish.

It is therefore urged that the court in which the succession was opened was without jurisdiction, and, consequently, that the proceedings can be attacked collaterally, and the decision of the supreme court in the case of *Simmons v. Saul* is quoted as authority.

In that case it is stated, page 448 of the opinion, that:

It is the settled doctrine of this court that the constitutional provision that full faith and credit shall be given in each State to the judicial proceedings of other States, does not preclude inquiry into the jurisdiction of the court in which a judgment is rendered over the subject matter or the parties affected by it, nor into the facts necessary to give such jurisdiction. *Thompson v. Whitman*, 18 Wall. 457; *Cole v. Cunningham*, 133 U. S. 107.

The court also finds that "under the averments of the bill, the parish court of Washington parish had jurisdiction of the succession of Robert M. Simmons," but in that case the facts recited in the petition on which the court assumed jurisdiction are identical with those recited in the petition in the proceedings under consideration, with the exception of the name of parties and description of property, and the court, in referring to said petition, holds that it

set forth the necessary jurisdictional facts to warrant the court in proceeding to administer the estate. The court, therefore, had before it in the petition the death of Simmons within the parish, his intestacy, the possession of property, and the smallness of the estate. The order granting letters of administration was a judicial determination of the existence of all those facts.

The court further held that:

It has long been a fundamental principle of law in that State that "the purchaser at a sale under the order of a probate court, which is a judicial sale, is not bound to look beyond the decree recognizing its necessity. He must look to the jurisdiction of the court; but the truth of the record concerning matters within its jurisdiction cannot be disputed. 2 Hen. Dig. 1494, par. 5, citing a long list of authorities.

Thus it will be seen that the jurisdictional facts must appear upon the face of the proceedings, but where such facts are recited therein, the purchaser at a sale under the order of a probate court is not bound to inquire into the truth of such allegations of facts, the order granting the letters of administration being a judicial determination of the existence of such facts.

That Bossie died in Catahoula parish was determined by the granting of the letters of administration by the parish court of that parish, and such fact was, in the case of *Simmons v. Saul* (*supra*), considered as establishing the domicile of the deceased, and thus giving jurisdiction to the parish court of that parish. See also case of *Duson v. Dupre*, 32 La. Ann. 896, referred to in the decision of the supreme court in the said case of *Simmons v. Saul*.

I must therefore sustain your decision holding that the proceedings under which Robinson purchased the right to the scrip in question can not be collaterally attacked in a proceeding before this Department, but only in a direct proceeding where jurisdiction of the estate of Bossie was assumed.

The scrip should therefore be authenticated, and forwarded to the surveyor-general for delivery to the proper party.

In this connection, I must call attention to the fact, before referred to, that there is nothing in the record before me showing any right to this scrip in any one claiming through Robinson.

PRACTICE—REVIEW—CONTEST—SOLDIERS' ADDITIONAL ENTRY.

GREGG ET AL. v. LAKEY.

On motion for re-review questions can not be raised outside of the issues involved in the case when formerly before the Department.

Where a pending contest is attacked on the ground of fraud, by one who makes application to contest the entry in question, notice should not issue on such application, but the case should be held for the final disposition of the prior contest.

The right of purchase under the act of March 3, 1893, can not be exercised in the absence of proof that the soldier's additional entry was based on a certificate of right that has been found erroneous or invalid.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

On the 4th of May, 1889, a soldier's additional homestead entry was made, in the name of Simon Lakey, for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 31, T. 21 N., R. 4 E., Helena land district, Montana.

On the 19th of November, 1890, Amy Gregg filed an application to contest said entry, and also the additional homestead of one, Harlan Cole, for land situated in the same section. Her application was rejected as to the entry of Cole, for the reason that his right to make additional entry was certified by your office prior to the instructions of February 13, 1883, and as to the entry of Lakey, because the affidavit was not sufficiently corroborated.

The application was amended and properly corroborated. It was then rejected by you, on the 28th of March, 1891, for the reason that it joined in one application a contest against two distinct entries, made by different parties, and for different land. From your decision an appeal was taken, and with it was filed a dismissal of said contest as to the entry of Cole. This appeal was dismissed by the Department, on the 11th of May, 1892, for the reason that no service of the same had been made upon Lakey or his counsel.

A motion for review of that decision was denied by the Department on the 10th of January, 1893 (16 L. D., 39), and on the 6th of Febru-

ary, 1893, you transmitted a motion, on the part of Gregg, for a re-review of both said departmental decisions.

Meanwhile, on September 1, 1891, Ezra M. Robords had applied to contest said soldier's additional entry, upon the ground that it was fraudulently made. In promulgating the departmental decision of May 11, 1892, you directed a hearing on the contest of Robords. Such hearing was suspended by the filing of motion for review. After that motion was denied, you ordered said hearing to proceed, but it is now again suspended by the motion for re-review.

On the 5th of January, 1893, one, J. M. Burlingame, Jr., applied to be cited to the hearing to be had on the charges of Robords, stating that he was an applicant for the land in question; that the entry of Lakey was fraudulently made; that Robords was a party to the fraud, and that his contest was made for the purpose of protecting the entry. He asked that he be allowed to prove the facts charged by him, and have preference right of entry upon said lands.

On the 23d of January, 1893, you decided that Burlingame had no such interest in the land as would entitle him to intervene, but in case the entry should be canceled on Robord's contest, he might be heard on the question of Robord's preference right.

Counsel for Burlingame appealed from said decision, but on the 24th of February, 1893, withdrew their appearance for him in the case, stating that it was made through "inadvertence."

On the 29th of March, 1893, Lucius B. Kendall, who described himself as a party in interest, filed a motion, asking that the pending motion for re-review, filed by Amy Gregg, be dismissed, and that departmental decisions of May 11, 1892, and January 10, 1893, be sustained, in so far as they dismiss the claims of said Gregg, and reversed and set aside, in so far as they recognize the right of Ezra M. Robords to contest said soldier's additional homestead entry; that the homestead application of Burlingame for the land be rejected, and his pending appeal be dismissed; and that the entry of Lakey be confirmed, and he (Kendall) be allowed to purchase under the act of March 3, 1893.

His motion is supported by his affidavit, in which he makes oath that said entry was made upon a certificate of the Commissioner of the General Land Office, of the right to make the same; that said land was conveyed to him by warranty deed on the 4th of May, 1889, for a valuable consideration, to wit, \$3000; that he purchased the land in good faith, without any knowledge of the fact that the certificate to said Lakey had been fraudulently procured; that there are no adverse claimants to the land, which fact the official record will prove, and that he is still the owner thereof. He further states that the invalidity of the certification to the said Lakey has been clearly established by affidavits now in the record; that by the confirmation of this certificate he will not acquire more than one hundred and sixty acres of public land, and he asks that

he be permitted to perfect his title by paying the government price for said land, as provided in the act of March 3, 1893 (27 Stat., 593).

To his affidavit is attached an abstract of title to the land, certified to by the clerk and recorder of the county, which shows the title to be in Kendall, his deed therefor having been recorded on the 6th of May, 1889.

Among numerous other things, the act of March 3, 1893, provides:

That where soldier's additional homestead entries have been made or initiated upon certificates of the Commissioner of the General Land Office, of the right to make such entry, and there is no adverse claimant, and such certificate is found to be erroneous, or invalid for any cause, the purchaser thereunder, on making proof of such purchase, may perfect his title by payment of the government price for the land; but no person shall be permitted to acquire more than one hundred and sixty acres of public land through the location of any such certificate.

If all the matters stated in the affidavit of Kendall, filed in support of his motion, are true, he is brought within the provision of law quoted above. I can not accept, however, without further proof, his statement that the entry was made upon a certificate issued by you on the 26th of February, 1889. Neither does he make it satisfactorily appear that such certificate is found to be erroneous or invalid. These facts must be clearly established, in order to entitle him to the benefits of the act of March 3, 1893.

The motion of Gregg for re-review of departmental decisions of May 11, 1892, and January 10, 1893, is based upon an ex-parte affidavit, which raises questions outside of the issues involved in her case when previously before the Department. No charges, such as she now makes, have been heretofore passed upon, and her present purpose cannot be accomplished by a motion for re-review.

Her charges now are against the good faith of Robords, in his contest against the entry of Lakey. A contest against a contest is not allowed, and her motion for re-review is accordingly denied.

On the 14th of April, 1893, you transmitted the appeal of J. M. Burlingame, Jr., from your decision of January 23, 1893. As stated before, the attorneys have said that their appearances in behalf of Burlingame was through inadvertence, and it may therefore be doubtful if any appeal was authorized by him. The fact remains, however, that the papers have been sent up on an appeal, which is, on its face, without defect, and should be disposed of. The matters presented by said appeal are so closely related to, and connected with, the matters involved in the motion of Gregg for re-review, and the petition of Kendall, that they may be properly considered as branches of one and the same case, and I have therefore concluded to take up and dispose of said appeal at this time.

In his appeal, Burlingame alleges that you erred in holding that, under the rules, it is necessary for him to await the result of the trial between Robords and Lakey, and in not deciding that the most expeditious and satisfactory thing to do, is to permit him to be heard at the

hearing ordered between Robords and Lakey, in support of the charges he makes. He also alleges that you erred in denying his rights in the premises, and in holding contrary to the law and the rules.

Your decision was in strict accordance with the rules of the Department, as laid down in the case of *Ludwig v. Faulkner, et al.* (11 L. D., 315). It was therein held that "where a pending contest is attacked on the ground of fraud, by one who makes application to contest the entry in question, notice should not issue on such application, but the case should be held for the final disposition of the prior contest."

There is no merit in the specification of errors accompanying Burlingame's appeal, and the decision appealed from is therefore affirmed.

You will direct the local officers to proceed with the hearing ordered by you on the 2d of June, 1892, on the charges of Robords, against the entry of Lakey, that the truth as to the charge made that Simon Lakey was not a soldier may be ascertained, and whether this fact was known to Kendall before his purchase.

Upon the showing made by Kendall, on his motion now before me, he will be allowed to intervene at such hearing, and submit any proof which he may desire, to establish his interest in, and title to the land in question.

PRACTICE—CERTIORARI—APPEAL—WAIVER.

SILVERMAN *v.* NORTHERN PACIFIC R. R. CO.

An application for certiorari may be allowed on behalf of a party whose failure to appeal in time is due to accident or mistake that is satisfactorily explained, and where the appellee waives his right to insist on a strict enforcement of the rules of practice.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

On the 9th day of January, 1893, you transmitted an application of the Northern Pacific Railroad Company, for a writ of certiorari, requiring you to certify to the Department the record in the case of *Nathan Silverman v. said railroad company*. The land involved is the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 3, T. 16. N., R. 5 W., Helena, Montana, land district.

It appears from the papers transmitted, that said land is outside of the withdrawal in favor of said road, of February 21, 1872, but within the limits of the grant to said company upon definite location of its line July 6, 1882. The records of your office do not show the existence of any claim for said land. On the 7th day of October, 1891, Nathan Silverman made application at the local land office to make homestead entry for it and other land in section 2, of the same township and range, which was denied by the register for the reason that it embraced

land in odd-numbered section within the limits of the grant to the Northern Pacific Railroad Company. On the same day, Silverman filed an application for a hearing, alleging that at the date when the right of the company would have attached, July 6, 1882, said land was occupied, improved, cultivated and claimed, by a qualified settler, who intended to make entry of the same. A hearing was had, and the register and receiver found from the testimony adduced that on the 6th day of July, 1882, the land in controversy was occupied and cultivated by one, William Nicholson, a qualified pre-emptor and homestead claimant, and that the tract in controversy was thereby excepted from the grant to the company, and recommended that Silverman's application be allowed, of which action the company was duly notified.

On the 12th of October, 1892, as no appeal had reached you, you examined the testimony and approved the finding of the local officers, and declared your action final, and the case was closed.

On November 21, 1892, W. K. Mendenhall, local attorney for the Northern Pacific Railroad Company, filed in your office a motion to open the case and allow the company's appeal, said motion being based upon the affidavit of J. B. McNamee, land attorney for said company, who swears substantially that he received notice of the local officers' decision of March 22, 1892, in said case, on the 25th day of March, 1892; that on April 14, 1892, he prepared an appeal on behalf of the company, at the company's office in Saint Paul, Minnesota, and on the same day inclosed said appeal, with a copy thereof in a letter addressed to "Tom Cooney, Helena, Mont." A copy of the letter to Cooney is set out in Mr. McNamee's affidavit, from which it appears that he was requested to file the original with the register and receiver, and serve the copy on Silverman. It appears from said affidavit that Cooney is the land agent at Helena, Montana; that said letter was addressed in printed letters "R. R. B.," indicating that the inclosed matter was "railroad business," and as such came under the care of the baggage-man; that said envelope was deposited with the regular railroad business for that day in the usual manner and place.

Mr. McNamee swears that he is now informed and believes that the package was never received by Mr. Cooney; that affiant is unable to state in what manner it went astray. That he was not informed of the loss of said package until he received a letter from W. K. Mendenhall, attorney for said company at Washington, D. C., dated November 1, 1892, stating that the Commissioner of the General Land Office had affirmed the decision of the local officers in said cause and closed the same "because of no appeal by the company from said decision." The affidavit closes as follows:

That this affidavit is not made for delay, but in good faith; for the reason that affiant as said attorney believes, and is now willing to show, to the Commissioner of the General Land Office, that said decision of the local officers is erroneously made; and that said company is in law the owner of the land involved in said cause under its said land grant.

By your letter of December 10, 1892, you denied the motion to open the case, and returned the accompanying appeal, and allowed twenty days to apply to the Department for certiorari.

In support of the application, counsel files a copy of a reply, filed by attorneys representing Silverman, to the company's appeal offered in the case, which reply the company's counsel contends is a waiver of the advantage of an appeal. Said reply commences with the statements that:

Without noticing any irregularity in the matter of appeal being filed at this late date, and not raising any question thereon, we simply desire to call attention to the general line of argument, to show that it, nor the authorities cited are applicable thereto.

This, in connection with the argument following it on the merits, is claimed by counsel for the company to amount to a waiver upon the part of Silverman of all objection to the failure to file and serve the appeal in the time required by the rules of practice, and in this view I concur.

The party having waived his right to insist upon the application of the rules of practice, the next question to be determined is whether the government, being a party in interest, should insist upon the strict application of the rules. From the showing made, it is clear that the company in good faith intended to appeal from the decision of the local officers, and its attorney prepared and mailed to the company's agent at Helena, the papers within the time required, gave directions for filing the appeal, and service upon the opposite party, and had no knowledge of the failure to complete the appeal until it was too late under the rules.

It was held in the case of *Dean v. Simmons* (15 L. D., 527) that an application for certiorari may be allowed on behalf of a party whose failure to appeal in time is due to a mistake that is satisfactorily explained, and where such action will not result in injury to innocent parties. Under the circumstances of this case, I think the failure to appeal within the time has been satisfactorily explained, and the application should be allowed. The record will therefore be certified to the Department for its consideration.

RAILROAD GRANT—SETTLEMENT CLAIM—PRE-EMPTION.

NORTHERN PACIFIC R. R. CO. v. MOORE.

Final proof and payment for a part of the land embraced within a pre-emption claim is an abandonment of such claim as to the remainder; and, in the absence of any further claim, leaves said tract subject to the subsequent operation of a railroad grant on definite location of the road.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

The N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 31, T. 7 N., R. 2 E., Helena, Montana, is within the primary limits of the grant to the Northern Pacific Railroad Company.

It was excepted from the withdrawal on general route (February 21, 1872,) by the pre-emption filing of George W. McCauley.

The map of definite location was filed July 6, 1882.

McCauley's claim was never perfected, but in 1876 one Van Voast, a qualified pre-emptor, took possession of and fenced in this tract, in connection with eighty acres adjoining it in section 30, same township and range. He continued in such possession and used it for pasturage and hay until December 14, 1881, when he applied at the local office to file his declaratory statement for this tract, together with the eighty acres upon which he resided in said section 30. His application was denied by the register, because it embraced the tract in controversy, supposed by the register to belong to the railroad company. He did not appeal from this rejection, but filed for the eighty acres in section 30, and made proof and received final certificate therefor, March 6, 1882, four months prior to the definite location of the line of the railroad. He continued in such use and occupation "until," as he says in his testimony, "they built the road in here" (spring of 1883), when he removed his fence and abandoned his occupation.

Subsequently, in September, 1887, James L. Moore, the claimant herein, made homestead entry for the tract. Prior to the allowance of this homestead entry (March 10, 1887), the railroad company applied to list the tract, but its application was denied by the local office, and the company appealed to your office.

A hearing was ordered, and facts, substantially as set forth above, were shown at the hearing upon which the local officers found in favor of Moore, and, by your letter of October 30, 1891, you affirmed their action, on the authority of the case of Northern Pacific Railroad Company v. McCrimmon, 12 L. D., 554.

The company has appealed from your said judgment.

The terms of the grant to this company are, that lands within the prescribed limits, "free from pre-emption or other claims, or rights," at date of definite location of the line of road, pass to the company. (Act of July 2, 1864, 13 Stat., bottom of page 367.)

The term "claims or rights," as used in the act, means such as were being asserted at the date of definite location. Such assertion may be actual or presumptive. Actual, as in the case of a settler; presumptive, as when a qualified entryman, though not an actual settler, is in the use and occupation of the land, the presumption, in the absence of any evidence to the contrary, is that such use and occupation is with the intention of claiming it under some one of the land laws. (See, as bearing on this point, *Jones v. Kirby*, 13 L. D., commencing at bottom of page 703.) If, however, the facts and circumstances surrounding such use and occupation are such as to overcome the presumption that he intended to claim the tract under the land laws, then such occupation must be regarded as a mere trespass, and would not serve to except the land from the grant.

From the evidence before me, I am forced to the conclusion that such was the occupancy of Van Voast, on July 6, 1882, when the rights of the company took effect. He had, in 1876, fenced in this tract, in connection with eighty acres on an adjoining even numbered section. In 1881, a year before the location of the company's road line, he had applied to make pre-emption filing for the whole one hundred and sixty acres. His application was denied, erroneously, it is true, but he acquiesced in the action of the local office, and filed for the eighty acres in section 30, upon which he made proof and received final certificate, four months prior to the definite location of the road. (See *Nix v. Allen*, 112 U. S., 129.) It does not appear that he ever laid any further claim to the land, and in about a year after he removed his fence, thus showing, I think, conclusively that, after his application to file for the land was refused, he abandoned all further claim to the land, and was not asserting or intending to assert any at the time the rights of the company attached. I think his testimony taken altogether tends clearly to show that he never claimed or intended to claim this land after his application to pre-empt it was denied, in 1881. Here is his direct examination in chief:

Question. Where did you reside in July, and particularly the 6th day of said month, 1882?

Answer. On land adjoining the land in controversy in this case.

Question. State whether or not at that time, July 6, 1882, you had in possession and occupied the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ Sec. 31, Tp. 7 N., R. 2 E., the land in question.

Answer. I did, I used it for hay and pasture.

Question. State if you had said land in question enclosed with your other land in the same enclosure.

Answer. I did.

Question. State if you had at that time exhausted your homestead or pre-emption rights?

Answer. I had not.

Question. State if at that time you were a citizen of the United States and over twenty-one years of age?

Answer. I was.

On cross-examination he was asked:

Did you ever lay claim to this land more than to fence it for the hay grown there?

Answer. I tried to file on it when I filed on the 80 I am now on.

Question. When did you try to make this filing, and why was it not allowed?

Answer. Think it was in 1880 or 1881; the register and receiver said it was railroad land.

* * * * *

Question. How does it come that you had this land fenced since 1876, and now you say Mr. Moore has resided there for several years.

Answer. I could not file on the land and *of course could not hold it.*

This he learned six months before the definite location of the road, and never afterwards laid any claim to the land, other than allowing his fence to remain until 1883.

I can not find from this evidence that there was any claim or right being asserted to this land on July 6, when the right of the road attached under its grant.

Your decision must therefore be reversed.

—

PRACTICE—MOTION FOR REVIEW—APPEAL.

DESMOND *v.* JUDD.

A motion for review filed out of time does not suspend the running of the time allowed for appeal.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

On the 31st of January, 1893, you transmitted, on the part of Geo. E. Desmond, motion for review of departmental decision of January 7, 1893, in the case of said Desmond against Benjamin F. Judd, in which Desmond's appeal from your decision of May 19, 1892, was dismissed, for not being filed within the time required by the rules of practice. The land involved is the NW. $\frac{1}{4}$ of Sec. 19, T. 49 N., R. 9 W., Ashland land district, Wisconsin.

For this land Judd made homestead entry on the 23d of February, 1891. His entry was contested by Desmond. After a hearing, the local officers decided in favor of the entryman. Their decision was affirmed by you on the 19th of May, 1892. Notice of your decision was served on the resident attorney of Desmond on the 20th of May, 1892. On the 22d of the following month he filed a motion for review, which was rejected by you on the 20th of July, 1892, for the reason that it was not filed within thirty days from the date when his attorney was notified of your decision of May 19.

On the 18th of August, 1892, he filed an appeal to the Department from your decision of May 19, which was dismissed on the 7th of January, 1893, for not having been filed in time. The motion before me is for a review of that decision. The grounds of the motion are, that the

time between the filing of his motion for a review of your decision of May 19, 1892, and the notice of your decision upon such motion, should be excluded in computing the time allowed for appeal. In support of this position, Rule 79 of the Rules of Practice is quoted.

The appeal to the Department from your decision of May 19, 1892, was filed ninety days after notice of that decision. Excluding the time between the 22d of June, when the motion for a review thereof was filed in your office, and the 20th of July, 1892, when said motion was rejected, from the time between the notice of your decision, and the filing of the appeal therefrom, it is found that said appeal was filed on the sixtieth day after said notice. This would be within the time allowed by the Rules of Practice, provided it were proper to exclude those days in reckoning the time for appeal.

Rule 79 of the Rules of Practice reads as follows:

The time between the filing of a motion for rehearing or review, and the notice of the decision upon such motion, shall be excluded in computing the time allowed for appeal.

That language would seem broad enough to include the case at bar, but the Department has construed it to apply only to cases in which the motion for review is filed within thirty days from notice of the decision of which a review is desired. In deciding the case of *Whiteford v. Johnson* (14 L. D., 67), this language is used:

A motion for a rehearing, when filed within the time prescribed by the rules, suspends the running of time allowed for appeal until the motion has been disposed of, and due notice given of the decision thereon; but, after the time allowed for filing a motion for review has expired, the filing of such a motion will not suspend the running of the time allowed for appeal, which must in such cases be filed within sixty days from the notice of the decision complained of, allowing the usual time for transmission by mail, prescribed by the rules.

That decision was cited and followed in the decision complained of. If the rule therein laid down is correct, the decision complained of should stand. There is no doubt that it would be good practice to refuse to accept motions for review, and other papers in an action, not filed within the time prescribed by the rules of practice, and thus avoid questions such as are raised in this case. It is the duty, however, of attorneys to familiarize themselves with said rules, and govern themselves accordingly. I regard the rule laid down in the *Whiteford* case as both sensible and sound, and the motion for review of departmental decision in this case is accordingly denied.

This conclusion also disposes of the motion, filed by the counsel for Judd on the 25th of January, 1893, for the dismissal of Desmond's motion for review. I thought best to dispose of the motion for review upon its merits, and have pursued that course.

RAILROAD GRANT—INDEMNITY—SELECTION—ADJUSTMENT.

GLOVER *v.* ALABAMA AND CHATTANOOGA R. R. CO.

The revocation of an indemnity withdrawal does not restore lands embraced in a pending selection.

The grant of lands made to the State of Alabama by sections 1, and 6, act of June 3, 1856, are separate and distinct grants, and should be adjusted separately. The fact that the lands certified in aid of the Wills Valley road are in excess of the amount granted therefor, does not preclude certification on behalf of the Northeast and Southwestern road.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

I have considered the case of John E. Glover *v.* Alabama and Chattanooga Railroad Company, involving the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 13, T. 22 S., R. 6 W., Huntsville, P. M., on appeal by Glover from your decision of March 5, 1892, sustaining the action of the local officers in rejecting his homestead application for said tract.

The land in question is within the indemnity limits of the grant for said company and opposite the portion south and west of Gadsden, originally conferred upon the Northeast and Southwestern Railroad Company.

Application was first made to select this land on account of the grant in March, 1883, upon which application no action appears to have been taken until by letter of July 25, 1891, it was returned to the local office for consideration and action, and was approved August 7, 1891, upon the tender of a new list covering the same lands.

Glover's claim depends upon an application filed August 8, 1891, and he seems to rest his case upon the ground that the grant for this company is fully satisfied, and that the indemnity withdrawal having been revoked, the land was subject to his application.

This tract having been embraced in the application to select filed in March, 1883, which application was pending at the time of the revocation of the indemnity withdrawal, was not restored (*Dinwiddie v. Florida Railway and Navigation Company*, 9 L. D., 74); further, in the case of *United States v. Alabama State Land Company* (14 L. D., 129), it was held:

The grant to the State of Alabama by section 1, act of June 3, 1856, in aid of the Wills Valley railroad, and by section 6, of said act, in aid of the Northeast and Southwestern railroad, were distinct and separate grants, and, in the adjustment thereof, there is no authority for the certification of lands within the limits of one road to satisfy losses on account of the other. (Syllabns.)

The amount of lands certified opposite the Wills Valley railroad exceeds the quantity granted to aid in the construction of that road, but there is a deficit in the grant opposite the Northeast and Southwestern Railroad, opposite which this tract lies.

It therefore remains but to consider the regularity of the application to select presented in March, 1883.

This list contained a designation of losses as a basis for the selections in said list, and in other respects it appears to be regular and should have been allowed when originally presented.

I must therefore hold that such application to select was a bar to the application by Glover, and the rejection of the same is affirmed.

SCHOOL LANDS—INDEMNITY SELECTIONS.

STATE OF CALIFORNIA.

School lands are not lost to the State by an executive order creating an Indian reservation where sections sixteen and thirty-six are expressly excepted therefrom; nor does the fact that said sections are within the boundaries of such reservation authorize selections in lieu thereof under the act of February 28, 1891.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

The State of California has appealed from your decision of June 17, 1892, rejecting its application to select the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 12, in T. 10 N., R. 20 W., Los Angeles, California, in lieu of certain lands in T. 4 S., R. 4 E., claimed to be lost to the State by reason of an executive withdrawal of the same (September 29, 1877), as a reservation for Indian purposes. That order is as follows:

EXECUTIVE MANSION, *September 29, 1877.*

It is hereby ordered that the following described lands, in California, to wit: all the even-numbered sections, and all the unsurveyed portions of township 4 south, range 4 east; township 4 south, range 5 east; and township 5 south, range 4 east, San Bernardino meridian, excepting sections 16 and 36, and excepting also any tract or tracts the title to which has passed out of the United States government, be, and the same hereby are, withdrawn from sale and settlement and set apart as a reservation for Indian purposes for certain Mission Indians.

R. B. HAYES.

The errors assigned on appeal are as follows:

1. Error in holding that the tracts assigned as basis for this selection were excepted from the Mission Indian reservation.
2. Error in overlooking the provisions of the act of Congress approved February 28, 1891, which authorizes the selection of indemnity for school land included within any Indian, military, or other reservation, and provides that selection in heir (lieu) of land embraced within such reservation shall operate as a waiver of the right of the State to the land so embraced.

The attorney for the State has filed an elaborate argument in support of the appeal, insisting that the bases were not excepted from the reservation; that there was no intention to except them; that the bases are the property of the Indians by a title anterior to the reservation; that they are included within the limits of a reservation, and so proper

bases for indemnity selection under the statute; and that the selection of indemnity is a waiver of title to the bases, etc.

It is not thought necessary to discuss these questions at length, because the case of the State of California (15 L. D., 350), as I construe it, is decisive of the question herein raised—namely: Were the school sections in the townships embraced in said executive order reserved, or are they still a part of the public domain, open to settlement and other purposes, including grants for school purposes? While the lands for which indemnity was asked in that case were held to be lost to the State, and so a proper basis for selections, such holding is in pursuance of a subsequent executive reservation made by President Garfield, March 9, 1881, in which he included all the unsurveyed portions of said township to which the government had title. This order embraced the school sections, because until survey the title of the State does not attach.

In that case it was said:

As the order of President Hayes of August 25, 1877, had already placed this township in reservation, *excepting the sixteenth and thirty-sixth sections* it is evident the sole purpose of the order of President Garfield was to put in reservation that part of the township that might upon survey be designated as the sixteenth or thirty-sixth section.

This means that, until the order of President Garfield had been promulgated, these sections were not reserved, and can not therefore be lost to the State for school purposes, by reason of said order.

Counsel for the State also invoke the act of February 28, 1891 (26 Stat., 796). As this question is not considered in the case cited, it may with propriety be briefly noticed here.

That part of the act relied upon by counsel is an amendment to section 2275 of the Revised Statutes. That section as it originally stood provided that, where pre-emption settlers prior to survey had occupied sections sixteen or thirty-six, their claims thereon should be sustained and the State allowed to select other lands in lieu thereof. A similar allowance was made where these sections were lost or diminished "by reason of the township being fractional, or from any *natural* cause whatever."

The amendment, among other things, provided that:

Other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory where sections sixteen or thirty-six are included within any Indian, military, or other reservation;

with a proviso that—

When any state is entitled to said sections sixteen and thirty-six, or when said sections are reserved to any territory, notwithstanding the same may be mineral land, or embraced within a military, Indian, or other reservation, the selections of such lands in lieu thereof by said state or territory shall be a waiver of its right to said sections.

It is contended that, although these sections were in words excepted from the reservation, yet, because they are located within the *boundary*

limits of such reservation, they come within the meaning of the amendment, and other lands may therefore be selected in lieu thereof.

I do not think this is a correct interpretation of the language of the statute. It does not seem to me that any reasonable construction of the words "included within a reservation" can be made to embrace lands expressly *excepted from it*, although such lands are located within the outside boundaries of the reservation. It must be remembered that when this reservation was made there was no provision in law for the selection by a state or territory of lands in lieu of lands reserved for Indian, military, or other purposes, and, if these sections had not been excepted, they would have been lost to the state, at least until the reservation was removed, or relief had been extended by Congress. So I think not only that President Hayes intended to except them, but that it was eminently just and proper that he should do so. The fact that the state would be estopped from claiming title to these lands, if it was allowed to select lands in lieu thereof, is no authority for allowing selections for lands not lost to the state.

The position assumed by counsel that these Mexican Indians have an anterior, indefeasible claim, by reason of their citizenship in Mexico prior to the acquisition of the territory through the treaty of Guadalupe Hidalgo, can not here be entertained, as no such claim is being asserted by them.

Your decision is affirmed.

PRIVATE CLAIM—SCRIP—SUCCESSION PROCEEDINGS.

NARCISSE CARRIERE.

In the case of a private claim in Louisiana confirmed to the "legal representatives" of the claimant, and held under succession proceedings as property of the claimant's estate, the judgment of the court, on application for scrip by the purchaser at the succession sale, must be accepted by the Department, in the absence of any proof of the existence of an assignee, or legal representative by contract. The case of the widow of Emanuel Prue, 6 L. D., 436, cited and distinguished.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893. *J. L. Wedge* ✓

I have considered the appeal of D. J. Wedge, claiming to be the legal representative of Narcisse Carriere, deceased, from your office decision of February 12, 1889, holding for cancellation certain scrip prepared under the provision of the act of June 2, 1858 (11 Stat., 294) for the satisfaction of a claim confirmed by the act of May 16, 1826 (4 Stat., 168) in favor of the legal representatives of Narcisse Carriere.

By the act of May 11, 1820 (3 Stat., 573) provision was made for filing notices of claims for lands in that part of Louisiana lying west of the Mississippi river, founded upon any Spanish grant, concession, or

order of survey and also for calling up notices which had theretofore been filed, and for a report by the register as to all such claims. Under date of October 1, 1825, the register at the Opelousas land office submitted a report of claims filed in his office (Am. State Papers, Green's, Ed., Vol. 4, p. 345) among which is found one marked "A No. 60" of which it is said:

The legal representatives of Narcisse Carriere claim a tract of land containing eight hundred superficial arpens, equal to 677 American acres, to wit: (Here follows a description of the land and of the document of title filed.)

This claim is founded upon a complete Spanish patent, the most authentic and complete that is known. The patent bears every mark of genuineness, is printed, and its date corresponds with one on the abstract of patents in this office, together with the quantity and boundaries of the land conceded. It is therefore recommended for confirmation.

By act of May 16, 1826 (4 Stat., 168) the several claims recommended for confirmation in the said report of the register of the land office at Opelousas were declared confirmed agreeably to said report, and in the list given in that act is found the claim designated by letter A, and numbered 60.

The act of June 2, 1838 (11 Stat., 294) contains the following provision:

That in all cases of confirmation by this act, or where any private land claim has been confirmed by Congress, and the same in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor-general of the district in which such claim was situated, upon satisfactory proof that such claim had been so confirmed, and that the same, in whole or in part, remains unsatisfied to issue to the claimant, or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied, etc.

In the year 1873 D. J. Wedge presented to the surveyor-general of Louisiana his petition setting forth that at a succession sale of the estate of Narcisse Carriere, deceased, had on August 29, 1872, he purchased the claim in question; that said claim was unlocated and unsatisfied, and asking that certificates of location in satisfaction of said claim be issued to him. With this petition was filed a copy of the process verbal of said succession sale showing the purchase by said Wedge of the claim in question. By letter of August 15, 1887, the surveyor-general transmitted to your office for action thereon certificates of location that day issued by him saying:

I have to state that upon a complete examination of the maps and records of surveys and other data on file in this office it appears that this claim has never been located. Proof of confirmation being exhibited and satisfactory evidence having been filed that the petitioner has been made the legal representative of the deceased Narcisse Carriere by due process of law, I have issued the scrip as stated.

By letter of June 10, 1879, your office suspended the case under the ruling of the Secretary of the Interior May 7, 1879, the action had upon this point of the case being the same as in the case of Madame

Bertrand which is fully set forth in the decision in that case (6 L. D., 487).

On April 12, 1888 after the decision in the Bertrand case, the certificates in the Carriere case theretofore issued were sent to the surveyor-general with instructions to cancel them and rewrite the scrip in six pieces of eighty acres each, four pieces of forty acres each, and one piece of thirty-seven acres. The surveyor-general rewrote said scrip or certificates as directed, and by letter of April 16, 1888, forwarded them to your office. After further consideration of the case in your office, the decision of February 12, 1889, from which the appeal now under consideration is taken, was rendered, wherein after reciting the history of the case and that a complete transcript of the record of the parish court in the matter of the succession of Narcisse Carriere had been filed, it is said:

All the forms of law seem to have been observed and a claim alleged to be that of "Narcisse Carriere No. 60" was publicly sold, said Wedge becoming the purchaser and receiving a sheriff's deed therefor, August 29, 1872.

You will observe that this case is controlled by department decision dated December 22, 1887, claim of the "Widow of Emanuel Prue," (6 L. D., 436).

It was not Narcisse Carriere, but *but his legal representatives* who presented this claim for 800 arpens, originally and to those representatives it was confirmed by the aforesaid act of May 16, 1826.

Under the Prue decision, therefore, it is evidence that Mr. Wedge took nothing of his purchase at the opening of said succession; Carriere having no estate to be administered upon.

There is no proper party before the land department, as an applicant for scrip under the confirmatory act of 1858, and the scrip is hereby held for cancellation subject to the usual right of appeal under the rules.

It is urged that the order of the parish court under which the sale in this case was made shows on its face all the facts necessary to confer jurisdiction, and that this being so, such order can not be attacked collaterally.

In the case of *Simmons v. Saul* (138 U. S., 439) the question as to the jurisdiction of the parish courts of Louisiana and the faith and credit to be given their records came before the supreme court and was discussed at some length the provisions of the statutes of Louisiana in relation thereto being given in full. The conclusion reached is expressed as follows:

The provisions of the law abundantly show, we think, that the parish courts were vested with original and exclusive jurisdiction over the administration of vacant and intestate successions, such as the allegations of the bill show this to have been. They do not differ materially from the laws of most of the States regulating probate matters. The general principles of probate jurisdiction and practice as settled by a long series of decisions in the State courts and in the courts of the United States, are applicable to the powers and proceedings of the parish courts of Louisiana, and have been recognized and enforced by the supreme court of that State.

The facts shown by the record of the parish court filed in this case are substantially the same as in the case before the supreme court. The petition here recites that "Narcisse Carriere departed this life in said

parish many years since leaving some property consisting of an old deferred private land claim against the United States," describing it; that it was less than \$500 in value, and asking for an inventory, appraisal, and sale. Of the like petition in the Simmons' estate, the supreme court said it "set forth the necessary jurisdictional facts to warrant the court in proceeding to administer the estate."

Proceeding, the court further said:

The court, therefore, had before it in the petition the death of Simmons within the parish, his intestacy, the possession of property, and the smallness of the estate. The order granting letters of administration was a judicial determination of the existence of all those facts.

This could all have been said equally as appropriately of the Carriere case, and to make it applicable thereto it would be necessary only to substitute the name Carriere for the name Simmons.

In that case the question came before the supreme court upon demurrer, and it was held that, taking the facts well pleaded as true, the parish court had a clear and unquestionable jurisdiction of the Simmons' estate, and that a judgment of a parish court in Louisiana rendered within the sphere of its jurisdiction is binding upon the courts of the several States and of the United States. While the court thus held, the rule that inquiry might be made as to the facts necessary to confer jurisdiction was adhered to, it being said:

It is the settled doctrine of this court that the constitutional provision that full faith and credit shall be given in each State to the judicial proceedings of other States, does not preclude inquiry into the jurisdiction of the court in which a judgment is rendered over the subject matter or the parties affected by it, nor into the facts necessary to give such jurisdiction. *Thompson v. Whitman*, 18 Wall., 457; *Cole v. Cunningham*, 133 U. S., 107.

In the case of *Thompson v. Whitman* (18 Wall., 457) the court, after stating the rule substantially as quoted above, and citing many authorities upon the subject, proceeded:

But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court.

But if it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If any such statement could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed, which avail nothing if the instrument is shown to be fraudulent.

* * * * *

On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provision of the fourth article of the Constitution, and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself.

One of the jurisdictional facts set forth in the petition in the Carriere succession, and one which is mentioned by the supreme court in the case of *Simmons v. Saul*, *supra*, as necessary to confer jurisdiction upon the parish courts is the possession by the estate of property.

Whether this Department may, of its own motion, inquire as to the jurisdiction of a court of this character in any given case, and if so, what circumstances will justify such an inquiry, need not be considered here, for it is, in my opinion, sufficiently shown that it had jurisdiction in this particular case. This conclusion is reached upon the theory that the claim or property in question belonged to the succession of Carriere, which theory rests upon the construction given the term "legal representatives" in the following pages. The claim was reported as made by the legal representatives of Narcisse Carriere, and the confirmation was to such representatives.

It is urged by this appellant that there are two classes of legal representatives, those *by contract* and those *in law*. That when the confirmation was in favor of a legal representative by contract it was necessary for the claimant to establish his right by showing a complete chain of title from the original grantee to himself, in which the confirmation administrators (7 Op., 60). *Cox v. Curwin* (118 Mass., 198); *Warnecke* would be made to him by name. And that in this case there being no legal representative designated by the Commissioner by name, the presumption immediately arises that the confirmation was to the legal representatives in law.

The term *legal representatives* in its ordinary use means executors and *v. Lumbca* (71 Ill., 91); *The People, etc., v. Phelps* (78 Ill., 147); *Bowman v. Long* (89 Ill., 19).

All these authorities, however, agree that the term is frequently used in a different sense, and that the construction to be given the phrase depends upon the intention of the party using it. The construction of this term "legal representatives" was presented to the supreme court in the case of *Hogan v. Page* (2 Wall., 605), and in the decision in that case it was said:

A difficulty had occurred at the Land Office, at an early day, in respect to the form of patent certificates and of patents, arising out of application to have them issued in the name of the assignee, or present claimant, thereby imposing the burden of inquiring into the derivative title presented by the applicant. This difficulty also existed in respect to the boards of commissioners under the acts of Congress for the settlement of French and Spanish claims. The result seems to have been, after consulting with the Attorney-General, that the Commissioner of the General Land Office recommended a formula that has been very generally observed, namely, the issuing of the patent certificate, and even the patent, to the original grantee, or *his legal representatives*, and the same has been adopted by the several boards of commissioners. This formula "or his legal representatives," embraces representatives of the original grantee in the land by contract, such as assignees or grantees, as well as by operation of law, and leaves the question open to inquiry in a court of justice as to the party to whom the certificate, patent, or confirmation should enure.

In that case the claim was presented to the board of commissioners

by "Louis Lamonde assignee of Auguste Conde," and the confirmation was made to "the representatives of Auguste Conde." Hogan claiming through Lamonde brought ejectment for a part of the land, and the court below decided that he was not entitled to recover. The supreme court held that the question as to whether there had been an assignment by Conde to Lamonde should have been submitted to the jury as a question of fact, and not of law.

The ruling of the court in that case was cited and followed in *Carpenter v. Rannels* (19 Wall., 138). In both of those cases the minutes of the board of commissioners showed that the assignee appeared in person in support of his claim, and it was for this reason that it was held that the term *legal representatives* should be so construed as to mean representatives by contract rather than be given its ordinary significance of representatives in law. It will be seen at once that the case of the Widow of Emanuel Prue (6 L. D., 436) cited in support of the decision of your office in this case was similar to the cases before the supreme court in that the claim was presented to the board by one claiming to be the assignee of Mrs. Prue.

In the case now under consideration there is nothing in the report of the register, or in any of the papers presented to me indicating that an assignee or representative by contract has ever appeared. This being true, we must treat the term "legal representative" as used in the report of the register in its ordinary meaning. This construction is in favor of, rather than against the conclusion that the parish court had jurisdiction to direct the sale of said claim.

The provisions of the civil code of Louisiana of 1824 in force at the time this claim was reported upon are not, in so far as applicable to this case, materially different from the provisions of the code of 1870, and quotations will therefore be made from the later code as follows:

Art. 873. The succession not only includes the rights and obligations of the deceased, as they exist at the time of his death, but all that has accrued thereto since the opening of the succession, as also the new charges to which it becomes subject (Art. 869, Code 1824).

Art. 934. The succession, either testamentary or legal, or irregular, becomes open by death or by presumption of death caused by long absence in the cases established by law. (Art. 928, Code 1824).

Under these provisions it would seem that this claim became assets of the estate of Carriere whether the confirmation was made before or after his death, and therefore properly within the jurisdiction of the proper parish court. The other provisions of the code of Louisiana which it seems proper to refer to in this case, are as follows:

Art. 1095. A succession is called vacant when no one claims it, or when all the heirs are unknown, or when all the known heirs to it have renounced it. (Art. 1088, Code of 1824.)

Art. 1097. Vacant successions are managed by administrators appointed by courts, under the name of curators of vacant successions. (Art. 1090, Code of 1824).

Art. 1190. If a succession is so small or is so much in debt that no one will accept the curatorship of it, the judge of the place where the succession is opened, after

having ordered an inventory of the effects composing it, shall appoint the district attorney of the district, or the district attorney *pro tempore* of the parish, curator of said succession, who shall cause the effects to be sold, and the proceeds to be applied to the payment of its debts; the whole to be done in as summary a manner as possible to diminish costs; provided, that this article is not to apply to successions amounting to more than five hundred dollars.

Some informalities appear upon the face of the record in this case, such as the appointment of an administrator before the inventory was made, the failure to give notice before making the appointment, etc. The same informalities or similar ones existed in the record presented in the case of *Simmons v. Saul supra*, but were held by the supreme court to be immaterial, or at least insufficient, to oust the parish court of jurisdiction or to be "made grounds on which the decree of the court can be collaterally assailed."

After a full consideration of the questions involved in this case, I have arrived at the conclusions, that this case is not controlled by the decision in the case of the Widow of Emanuel Prue (6 L. D., 436) cited in support of the decision of your office herein, that in the absence of a showing that there ever was in this case an assignee or legal representative of Carriere by contract, the judgment of the parish court that the claim became assets of his estate must be accepted, that under the ruling of the supreme court in the case of *Simmons v. Saul supra* the parish court of Lafayette parish had jurisdiction over the succession of Carriere, that the informalities in the record are not such as to present grounds upon which the decree of the parish court may be successfully assailed, and that the sale under that decree must be recognized as vesting in the purchaser thereunder all the rights of the estate or of Carriere himself by virtue of the confirmation of his claim. It follows then that the decision of your office holding for cancellation the scrip prepared for the satisfaction of this claim was in error, and the same is therefore reversed.

SOLDIER'S ADDITIONAL HOMESTEAD—MISSOURI HOME GUARD.

SMITH HATFIELD ET AL.

In the consideration of a motion for review it will be presumed that record facts, as found in the government archives, as well as all facts presented by the parties in interest were within the Secretary's knowledge, and were by him considered in his former decision.

The right to make soldier's additional homestead entry does not extend to members of the Missouri Home Guard.

The doctrine of *stare decisis* is recognized and followed in the Department in the disposition of cases that involve principles well established by a uniform line of decisions.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

I have considered the motion for rehearing in the matter of Smith Hatfield, *et al.*, for certification of additional homestead rights.

It appears from the record that your office, September 11, 1883, rejected said application. By decision of March 1, 1888 (6 L. D., 557), my predecessor, Secretary Vilas, affirmed the decision of your office, and, on August 18, 1888, he overruled a motion for review of said decision (Press copy-book 161, p. 415).

The case is one involving the question as to the right of those who rendered service in what were termed Missouri Home Guards to the benefits of the provisions of sections 2304 and 2306 of the Revised Statutes of the United States. This question has repeatedly been before the Department, and the decisions have uniformly been to the effect that those who were members of the Missouri Home Guards are not entitled to the benefits of the statutes above cited.

Such was the effect of the decision rendered in this case, March 1, 1888, and in the same case, on review, August 18, 1888. The petition, which gives occasion for this opinion, was not filed until December 30, 1889, more than sixteen months after the rendition of the decision on the motion for review.

The contention is that the first finding in the original decision, "that the Missouri Home Guards were a State military organization, was conspicuous error of fact." (Page 21 of brief.) Also, that

The evidence necessary to establish the right was in the records of the government; its existence even was unknown, and diligence could not discover it sooner than now. These applicants for certification are not only entitled to it by virtue of their position, but they are meritoriously entitled for their long and expensive litigation made necessary by the failure of the Department to discover from the records in the executive custody the true status of these soldiers. (Page 42 of brief.)

This is, in effect, an allegation of newly discovered evidence. It is not shown why it could not have been discovered by the parties in interest or their counsel until after there had been two decisions by the Department in the case now under consideration, nor is it made to appear that my predecessor, at the time of making said decisions, did not have before him all the facts now alleged to be newly discovered.

I can not assume, because he did not in his decisions review in detail all the record facts now set up in support of the pending petition, that they were not taken into consideration. On the other hand, the presumption, nothing appearing to the contrary, is that record facts as found in the government archives, as well as all facts presented by the parties in interest, were within the Secretary's knowledge and were by him considered.

While to strictly apply the doctrine of *res judicata* in *ex parte* cases, or cases between the government and claimants under its laws, would perhaps be harsh, yet there must come a time when even this class of cases should be regarded as closed and finally settled. But if *res judicata* be not applied to this case, the legal principle involved seems so well settled by numerous decisions of the Department that I am not now called upon to determine its correctness.

January 3, 1880, more than thirteen years ago, Secretary Schurz, in the Wilson Miller case (6 C. L. O., 190), held that the Missouri Home Guards are not entitled to the benefits of section 2306 of the Revised Statutes. This interpretation of the law was adhered to August 30, 1883, by Acting Secretary Joslyn, in the case of William French (2 L. D., 235), and by Secretary Teller on October 1, 1883, in the same case, on review (ib., 238). It was also endorsed and adopted by Secretary Vilas on March 1, 1888, in the original decision in the case now before me (see 6 L. D., 557), and again by the same Secretary, in the same case on review, August 18, 1888 (Press copy-book 161, p. 415).

The question was also directly passed upon, August 18, 1888, by Secretary Vilas, in the case of Chauncey Carpenter (7 L. D., 236), and the same conclusion reached—viz: that the right to make soldier's additional homestead does not extend to members of the Missouri Home Guard.

Thus, for a number of years, the rulings of the Department have uniformly been to the effect above indicated, and the principle has become, so well established as to bring it within the rule of *stare decisis*, and as so settling a point by decision that it forms a precedent not to be departed from.

The act of May 15, 1886 (24 Stat., 23), making provision for the discharge of members of the Missouri Home Guards, "whose claims for pay were adjudicated by the Hawkins Taylor Commission," does not relieve from the application of the rule above enunciated, for that act was in existence and before the Department when three of the several decisions herein cited, adverse to the contention of counsel, were rendered.

I must therefore decline to disturb a ruling of so long standing as that which controls in this case, and the petition for re-review is overruled.

I may add that if the question were a new one, now raised for the first time, I should, so far as the consideration of this motion has led me to investigate the law on the subject, be inclined to rule as has been ruled by the Department for thirteen years, that members of the Missouri Home Guards are not entitled to the benefits of section 2304 and 2306 of the Revised Statutes.

TIMBER AND STONE LAND—MINING CLAIM.

SHEPHERD *v.* BIRD ET AL.

An agreement, made prior to final proof, to sell land embraced in a timber land claim defeats the right of purchase under the act of June 3, 1878.

Land containing stone suitable for making lime may be entered as a placer claim, or purchased under the timber and stone act.

As between two applicants for such land, one under the timber and stone act, and the other as a placer claimant, priority in the assertion of a legal claim must determine the rights of the parties.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 7, 1893.

On September 17, 1888, Frank W. Bird filed his application to purchase lots 4 and 5 in Sec. 22, and lot 1 in Sec. 23, and lot 1 and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 26, T. 37 N., R. 1 W., Seattle, Washington, under the act of June 3, 1878 (20 Stat., 89), alleging that said land was chiefly valuable for timber.

On December 27, 1888, Joseph P. Shepherd applied to purchase the same land under the same statute, alleging that said tracts were chiefly valuable for stone, and protesting against the application of Bird. He alleged that said land was not chiefly valuable for its timber, and that Bird's application was not made in good faith for his own use and benefit.

Bird offered proof in support of his application on March 19, 1889, and Shepherd offered his proof on November 15, 1889. Thereupon a hearing was ordered to determine the rights of the parties, which was held on December 7, 1889, both parties attending. There also appeared at the trial one Patrick Gibbons, who protested against the claim of Shepherd, alleging a right under the mining laws, and claiming to have been in the possession of a part of the land continuously since long before Shepherd's application was made, and that he had located said land as a placer mine and had erected kilns and was making lime out of the limestone contained in said placer location.

On October 20, 1890, after considering the evidence submitted, the register and receiver held that lot 1 of Sec. 23 is chiefly valuable for its limestone, and that the remaining tracts are chiefly valuable for timber; that Bird's application was not made for his own use and benefit, and that Shepherd's application should be accepted except as to lot 1 of Sec. 23. An appeal was taken, and on August 24, 1891, you considered the rights of the parties in the premises, and held that Bird's application should be rejected because not made for his own use and benefit. You held that all the land in question was chiefly valuable for timber, except lot 1 of Sec. 23, which you held was chiefly valuable for its limestone. You rejected Shepherd's application to purchase the land other than lot 1 of Sec. 23, because he applied for it under the timber

and stone act, alleging that its chief value consisted of the stone, while you found that these tracts were chiefly valuable for timber.

You held that lot 1 of Sec. 23 was chiefly valuable for stone, and that Gibbons being in possession of and working the lime quarry when Shepherd applied for it, was prior in right and the claim of Shepherd should be rejected. In other words you rejected the claim of both Bird and Shepherd and refused to pass on the claim of Gibbons because it was not properly before you. Both applicants have appealed from your judgment to this Department.

The record shows that in May, 1888, John G. Ohlert, who lived near this land, discovered that limestone rock existed on a part of it (since found to be lot 1 of Sec. 23). He located it first as a placer, but was informed by some one soon after that it could not be entered under the placer laws. He then located it as a lode, and also applied to purchase the whole of the lands in question under the timber and stone act. Thereupon he went to Seattle, sold an interest in his claims to Bird and Brannen, relinquished his timber land application to the United States and organized and incorporated the "Seattle Lime and Marble Co." and filed the articles of incorporation on May 31, 1888.

Soon after Bird purchased nearly all of the stock of said company, and on September 17, 1888, applied to purchase the tracts in question under the timber and stone act.

On October 25, 1888, he sold all his interest in said claim to Joseph P. Shepherd, T. J. Milner and Alfred Whittle for \$5000, or, rather, agreed to relinquish all his claims on condition that they pay the above consideration. A part of the consideration was paid, and the stock was transferred to Milner, Shepherd and Whittle. The total capitalization of the Seattle Lime and Marble Co. was \$300,000, divided into 150,000 shares of \$2 each. At the time of the sale from Bird to these gentlemen he owned 149,880 shares of the stock, or all of it except one hundred and twenty shares. Whittle sold two hundred and fifty shares to Patrick Gibbons for \$500. When Gibbons went to the lime kilns on the tract he found that the company was in debt about \$5000 for labor and materials furnished. He paid off the debt and afterwards bought Milner's interest in the claim for \$2500 and has been in possession of the lime kilns and working the same ever since. He claims that Shepherd and Whittle never did put any money in the business, and that he paid Shepherd for his trouble about \$350 for superintending the works while they belonged to Bird, Milner and Shepherd, and that Shepherd and Whittle abandoned the property rather than pay off its debts. The \$350 paid Shepherd was a part of the \$5000 company debts paid by him.

On December 27, 1888, Shepherd applied to, purchase the tracts in question under the timber and stone act, and on January 12, 1889, Gibbons located twenty acres of said ground, including the lime kilns and improvements, as a placer claim.

At the time Bird applied to purchase these tracts, the kilns were owned by the Seattle Lime and Marble Co., a controlling interest in which he owned. The application was evidently made for the use of the company, and his agreement to sell thereafter and before making final proof shows that his application to purchase was not made for himself, nor in good faith; besides, the agreement to sell is sufficient to defeat his right to purchase, since under the act in question the proof must show that he—

does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself.

There can be no doubt but that all the land in question is chiefly valuable for its timber and stone. It is of no value for any thing else, being on a steep hillside or mountain, nearly inaccessible, and very rough and rocky. A great deal of the stone is of little value, but on lot 1 of Sec. 23 limestone may be found that is suitable for the manufacture of lime, and, judging from the money that has been expended in burning lime there, and the efforts of all these parties to get title to the limestone land, it must be of considerable value.

Under the decisions of this Department stone suitable for making lime may properly be entered as placer ground. *Maxwell v. Brierly* (10 C. L. O., 50); *Conlin v. Kelly* (12 L. D., 1). It may also be properly entered or purchased under the stone and timber act, *supra*, and I think, in considering the rights of Shepherd and Gibbons in this case, the priority of their respective claims must be considered, and the right given to him who is found first to have asserted his claim.

Shepherd applied to purchase December 27, 1888, and if at that time no one had initiated a *bona fide* claim to the tract under the laws of the United States, and if the tracts were not in the possession or occupancy of a *bona fide* settler, then his claim should be allowed, as being the first asserted. Under the facts as shown by the record I think Shepherd is clearly entitled to purchase under the stone act that part of the tract found to be chiefly valuable for stone, to wit: lot 1 of Sec. 23, T. 37 N., R. 1 W., for the reason that he first applied to do so, and it was at the time subject to purchase under the stone act.

The claim of Gibbons for a part of lot 1 in Sec. 23 is based on his long occupancy and use, and on his placer location made on January 12, 1889. His actual claim against the United States, the owner of the tract, is based on the placer location.

Whatever claims he may have had prior to that time were only such as were asserted by those under whom he gained possession, and those under whom he claims never asserted any claim as against the government, unless the lode location made by Ohlert was the assertion of a claim, and that was long since abandoned; besides, the tract was not

subject to location and entry as a lode claim. As a matter of fact Gibbons' claim against the government must be held to have been first asserted on January 12, 1889, when he made a placer location. True, he was in possession before that time, and he and those under whom he claims possession had placed improvements on the land. He had not, however, on December 27, 1888, when Shepherd applied for the land, made any settlement on the land, nor has he ever claimed any rights as a settler, or made any improvements such as a settler would have made; and since, on December 27, 1888, he had no legal mining claim on said lot 1, it was properly subject to Shepherd's application to purchase.

The balance of the tract, being chiefly valuable for timber, is not subject to entry and purchase under the application to buy it as stone land.

Your judgment is accordingly reversed.

TIMBER CULTURE ENTRY—SECTION 452, R. S.

WALKER v. PROSSER.

A timber culture entry made by a special agent of the General Land Office will not be canceled on a charge of invalidity at inception, where it appears that it was allowed under an express ruling of the Commissioner, and that the entryman had subsequently complied with the law in good faith, and was not in government employ at the time the contest was initiated.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 7, 1893.

I have considered the case of John A. Walker v. William F. Prosser, on appeal by the latter from your decision of March 30, 1892, holding for cancellation his timber culture entry for lots 1, 2, 5, 8 and 10, Sec. 2, T. 8 N., R. 24 E., North Yakima, Washington, land district.

The record shows that on October 18, 1882, Prosser made timber culture entry for the land in controversy, and on October 28, 1889, Walker filed affidavit of contest against the same.

The affidavit was amended, and as such it alleged that the entryman was disqualified to make timber culture entry, because at the time of making it he was a special agent of the government, appointed by the Commissioner of the General Land office; secondly, that he had failed to plant and cultivate trees on the said tracts. A hearing was duly had upon the charges made, and the local officers held that as he was such special agent, the entry was void in its inception, and recommended its cancellation. From this decision the entryman appealed, and you, upon considering the case, affirmed said action, and held the entry for cancellation, from which decision he also appealed.

This case is peculiar. As the local officers say, "A great hardship has been done the contestee in this case, because, we have no doubt,

he was allowed to make this entry upon the authority of the letter before referred to." The letter "referred to" was a letter by Commissioner McFarland to the register and receiver at Olympia, Washington Territory, dated July 22, 1882.

This entryman had made final proof on another tract of land, on which he had a pre-emption filing, and being a special agent of the general land office in the district in which the land was situated, the local officers declined to accept the proof, but transmitted the same to the General Land Office, asking instructions. The letter referred to contained *inter alia*, the following rulings:

It is held by this office that the case of Mr. Prosser does not come within the inhibition contained in section 452, Revised Statutes, and that a special timber agent may be entitled to the pre-emption privilege, not being employed in the general land office at Washington. The circular of August 23, 1876, issued by this Office, under the Hon. Secretary's decision of August 3, 1876 (3 Copps Land Owner, 122), forbids the entry of public land by clerks and employees in the local land offices, but does not apply to special agents.

Under this ruling, he made the timber culture entry now before me, on October 18, 1882.

In 1883, the case of Grandy *v.* Bedell came before Secretary Teller (2 L. D., 314). Bedell had made a timber culture entry while he was a receiver's clerk in the land office in the district in which the tract was situated. He had ceased to be such clerk when the contest against the entry was initiated. After quoting the statute, section (452, R. S.), and referring to the circular extending the operation of the statute to include clerks in the local offices, and referring also to the case of State of Nebraska *v.* Dorrington (2 C. L. L., 1882, 647), the Secretary says:

But in the case now under consideration, the entry was allowed November 8, 1875, and since that time the claimant has apparently in good faith observed the requirements of the timber culture law, so far as within his power. At the time of the contest the claimant was not an employé of the district office. Taking these facts into consideration, and the further one that he was not by express provision of law incompetent to make the entry, I am of the opinion that it should be permitted to stand. Under the existing regulations of your office the entry should not have been allowed in the first instance, but inasmuch as it was, to insist on its cancellation after so many years' compliance with the law, would seem to be giving undue importance to the rule forbidding such entry.

In the case at bar it is evident that the entryman did not intend to defraud the government, as inquiry was duly made of the Commissioner of the General Land Office, and the facts were laid before him. Beside this, the entryman has not been in the government employ as such special agent since 1885, and like Bedell, in the case cited, he was not in government employ when the contest was commenced. If he was inhibited at the time the entry was made, the disability was removed before the contest was initiated, or any adverse right attached.

An entry or filing made by a minor is invalid, but if the disability of infancy is removed before an adverse claim attaches, or a contest is initiated, the invalidity is cured. James F. Bright (6 L. D., 602).

So when an alien makes a filing before declaring his intention to become a citizen, it is invalid, but declaring his intention before any contest is initiated, or adverse claim attaches, it relates back to the date of filing, and cures the defect. *Lord v. Perrin* (8 L. D., 536).

The evidence shows that the local officers were substantially correct in saying "Bad faith can not in anywise be imputed to the entryman, for it appears that he has expended considerable time and money attempting to grow timber on the land, but with meagre results."

There is another matter that enters into the consideration of this case. It was of record that the entryman was a special agent, and it was notorious in the community in which this land is situated that he was serving in that capacity. I will not say that an estoppel can be plead in the case, but I will say that the contestant's claim is entitled to less consideration than it would have been, had he asserted it immediately upon the entry being made, instead of standing by until the entryman has fenced a large tract of the land, and broken and cultivated twenty or thirty acres, and planted and replanted trees, and until, by his (the plaintiff's) own statements, a canal is being constructed which will enable the entryman to irrigate his tree claim, and which renders the land of double, or treble the value it was when the entryman began work upon it.

Having considered the case in the light of all the facts, and especially the fact that the entryman had the direct ruling of your predecessor, that he did not come within the inhibition of section 452, R. S., which, at the time of making his entry, was to him the law, I cannot concur in your rulings.

There seems, indeed, to have been no clear sweeping ruling upon the question until February 3, 1890, in the case of *Herbert McMicken, et al.* (10 L. D., 97), this being long after this entry, and long after the entrymen had ceased to be in the government employ.

I agree with the local officers that there was error in the ruling, that a special agent does not, under the present rulings, come within the inhibition of the statute, but such, as I have said, was not the ruling of the Commissioner when direct inquiry was made of him in this entryman's case, at the time the entry was being made. This peculiar feature of the case, and the hardship it would work to deprive the entryman of his improvements, made in good faith, and turn them over to one who has stood by all the years of the entry and seen them being made, compels me to follow the decision of Secretary Teller, in *Grandy v. Bedell, supra*. The contest is therefore dismissed, your decision accordingly reversed, and the entry will remain intact.

ISLAND—SURVEY—RAILROAD AND SCHOOL GRANTS.

STATE OF FLORIDA ET AL. *v.* WATSON.

An island is properly surveyed and returned as an independent tract where the lake within which it lies is made the boundary of the sections lying on the rim of said lake.

Sections, or fractional sections, as so returned, must be considered as containing the exact quantity expressed in such return, and the rights of a State under the school grant, or of a railroad company under its grant must be controlled thereby.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

I have considered the appeal by the State of Florida from your decision of November 16, 1891, holding that a certain lot, numbered 1 and containing 17.32 acres, in township 12 S., range 23 E., is an independent tract, and not parts of sections 15 and 16, in which it geographically lies by extending the lines of the survey over Orange lake, in which the island is situated.

Since the case has reached this Department, the Florida Central and Peninsular Railroad Company has petitioned to intervene, claiming, under the grant made by the act of May 17, 1856 (11 Stat., 15), that portion of the island which by an extension of the lines would be included in section 15.

By reason of Orange lake, sections 15 and 16 of said township are made fractional, each containing between 150 and 200 acres.

This township has been twice surveyed, first in 1835 and again in 1851. In each of these surveys this island was returned independent of the sections, and it is upon this return that you hold that it does not form a part of said sections, and, consequently, would not pass under either the school or railroad grant, which was of specific sections in place.

The field notes show this island to be 13.50 chains south of the termination of the line between sections 15 and 16, on the rim of the lake, and it would be included within said sections, if the lines were projected, but the southern corners of the section are on the meander line of the lake, and, if projected to the extent of a mile in length, the southern corners would be near the center of the lake.

The survey of this township was made in 1835 and again in 1851, in accordance with the instructions to surveyors-general then in force and still in force.

The boundaries of the subdivisions of the public lands as thus established and returned by the duly appointed government surveyors, when approved by the surveyor-general and accepted by the government, are unchangeable. (Circular March 3, 1883.)

Unless those surveys were absolutely in violation of law, sections 15 and 16 and all other sections made fractional by said lake, and so returned by the surveyor-general, must be held to contain the exact quantity of land expressed in the return. (Section 2396 R. S.)

If the lake lay entirely within the boundaries of a section—that is, the four section corners—all islands within the lake would be a part of the section, but, if there is no place to establish and fix a section corner by reason of the existence of a body of water, the sections or tiers of sections affected thereby must be meandered and such sections made fractional.

In the circular of instructions of March 13, 1883, 1 L. D., 671, relative to the "Restoration of Lost and Obliterated Corners," a synopsis of the various acts of Congress relating to the public surveys is given, from which the Commissioner said it is evident—

That in fractional sections where no opposite corresponding corner has been or can be established, any required subdivision line of such section must be run from the proper original corner in the boundary line due east and west, or north and south, as the case may be, to the water course, Indian reservation, or other exterior boundary of such section.

Under this construction of the law relating to the public surveys, the lake was made the southern exterior boundary in the survey of said sections 15 and 16, and all islands found within such waters and not within the four section corners were properly excluded therefrom and returned as separate tracts, for the reason that it was a fractional section, where "no opposite corresponding corner" could be established, and the subdivisional line running north and south was by the very terms of the law directed "to be run from the proper original corner in the boundary line to the water course."

The public lands are subject to disposal after survey and in the manner they have been surveyed, and the grant to the railroad company was not of a quantity or body of land, but of certain technical sections. The subdivisions made by the public survey and approved by the surveyor-general and the Commissioner determine the boundaries of the several technical sections and fractional sections, and are unchangeable. Said sections or fractional sections as so returned shall be held and considered as containing the exact quantity expressed in such return, and the rights of the railroad company under its grant and of all other parties must be controlled thereby.

Your decision, in so far as it holds that lot 1, in township 12 south, range 22 east, is an independent tract and not parts of sections 15 and 16 of said township, is hereby affirmed. The homestead entry of Watson having been relinquished since the case has been pending before the Department, removes him from the case as a party in interest.

PRE-EMPTION FILING—AMENDMENT—ADMINISTRATOR.

ORVIS v. BOREN.

A pre-emption filing made by an administrator as such, can not be amended so as to be the filing of such party in his individual right, but an application to so amend may be accepted as the filing of such party, in the absence of any adverse claim.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

The S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 22, T. 45 N., R. 8 W., Lake City, Colorado, was originally within the Ute Indian reservation, and so continued until the act of June 15, 1880 (21 Stat., 199), was approved, when it was set apart for the benefit of the people as a public park. This last reservation continued until May 14, 1884, when it was restored to the public domain (23 Stat., 22).

On August 3, 1877, one Jarvis moved on to the tract with his wife and child, and continued to live there until his death on February 14, 1879. Mrs. Jarvis and child continued to live there, and in June, 1882, she was married to Lewis F. Orvis, who took up his residence on the land and has resided there continuously to the present time.

The plat of survey was not filed until April 24, 1886.

Martin Birtch filed a pre-emption declaratory statement for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, together with other adjoining land, soon after the plat was filed, and made final proof on November 27, 1886, when Orvis, who had been appointed administrator of Jarvis, appeared as such administrator and protested against the allowance of said proof, on the ground of prior settlement as to the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 22.

On March 14, 1887, Orvis, as administrator, offered proof in support of the claim of the heirs of Jarvis, having previously filed a pre-emption declaratory statement as such administrator. Birtch, claiming the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section, protested against said proof; and William Rothwell and James W. Austin, who had filings on the rest of said land, each protested against the right of said administrator to make entry of the tract.

March 16, 1887, the register and receiver decided against Orvis, who soon after filed a motion for review, and at the same time asked to amend his declaratory statement so as to claim the land in his own right instead of as administrator. The motion for review was denied, as was also his application to amend his filing. Orvis appealed from the action of the register and receiver, both as administrator and in his individual right.

On May 4, 1889, you affirmed the action taken by the local officers, and afterwards the case was brought to this Department. On November 22, 1890, 11 L. D., 477, it was held that (syllabus)—

A settlement on land that is under reservation confers no right of pre-emption, and if the settler dies, while the land is in such condition, his heirs have no right thereto that can be perfected under section 2269 of the Revised Statutes, after the land is restored to the public domain.

The right to amend a declaratory statement can not be exercised in the presence of a valid intervening adverse claim.

Orvis as administrator and Orvis individually were defeated. In this judgment it was held—

At the time this land became subject to settlement and entry, the widow of Jarvis had married, and her child was a minor. Neither she nor the child was then qualified to make entry, but Orvis, if otherwise qualified, might by virtue of his settlement at that time have filed for the land in his own right, and the question of priority would then have been between himself and Birch, as to one part of the tract, and between himself and Austin and Rothwell, as to the other. But he failed to file a declaratory statement in his own name, and when he applied to amend his filing so as to claim the tract in his individual right, the right of Birch, Austin and Rothwell had attached by their filings, made within three months from the filing of the township plat in the local office, and the application to so amend his declaratory statement was therefore properly rejected.

I find no error in the decision of your office, and it is affirmed upon each and all of the points therein decided.

Now this judgment, as we have seen, was rendered on November 22, 1890. Prior to this time, to wit, on November 9, 1889, James M. Boren settled on the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Sec. 22, and filed his pre-emption declaratory statement therefor on November 12. It seems that Austin and Rothwell abandoned their claims to the land, or, at least, it is not shown that they or either of them paid any attention to the settlement or filing of Boren.

Orvis asked the Department to review its judgment of November 22, 1890, but this it refused to do on June 22, 1891. In the mean time, that is, June 8, 1881, Boren made final proof, and Orvis filed a protest against it "for himself and as administrator and for Flora Lucy Jarvis, heir of A. H. Jarvis."

Boren's application to purchase the tract was rejected by the register and receiver, and when you came to consider the case on January 15, 1892, you held that—"It was . . . a mistake to allow him (Boren) to make final proof while Orvis' petition for review was pending." You held that—"Boren's settlement and filing having been made during the pendency of Orvis' appeal, and long before action was taken on the latter's application to amend his original filing his (Boren's) rights to the tract in controversy are held to be subject to the prior rights of Orvis."

You also held that the claims of Rothwell and Austin having been eliminated from the case, "Orvis will be allowed to amend the filing made by him as administrator . . . to a filing in his own right for the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section 22, and he will be allowed ninety days from notice hereof within which to make final pre-emption proof and payment for said tract;"

and you stated that "should such entry be allowed, the proof hereafter made by Boren, though irregular, may be accepted, and his entry allowed for the SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of said section 22."

From this judgment Boren appealed to the Department, but on December 6, 1892, your judgment was formally affirmed.

He has now filed a motion for review of said departmental judgment, alleging substantially that Orvis has no superior claim to the land; that the judgment of the Department in the case of *Orvis v. Birtch et al.*, finally determined that he could not take the tract as administrator, nor could he amend his filing so as to take the land for himself.

Prior to the date of judgment sought to be reviewed Orvis had never filed a declaratory statement for himself, but he did on the very day the map of survey was filed in the local office file a pre-emption declaratory statement as administrator of the estate of Jarvis. In 1887 he asked to amend his filing so that he could claim the tract himself, and it was finally decided by the Department that he could not do it. But it seems the objection to his so doing was largely based on the fact that adverse claims had intervened, and hence the filing could not be amended (11 L. D., 477).

I am of the opinion that a filing made as administrator can not be amended so as to be a filing of any other person. Orvis in his individual capacity is an entirely different person from Orvis as administrator.

Boren's settlement was made and his filing and proof offered while the case of *Orvis v. Birtch et al.*, involving title to the same land, was pending in your office and this Department, and while his being allowed to make final proof at that time was irregular, still in a few days thereafter the pending case here was finally decided on review to the effect that Orvis could not be allowed to make entry, and since Austin and Rothwell have abandoned their claims to the tract, Boren's proof may be allowed to stand, provided, his rights are found to be superior to those of Orvis.

Orvis settled on the land in 1882, and was residing there in 1886, when the tract became subject to settlement and entry. In 1891, when Boren submitted proof on his filing made in 1889, Orvis protested in the name of the heir of Jarvis as administrator, and in his individual capacity. From the very nature of things he could only protest in behalf of one person or class of persons.

The Department has already decided in his case against *Birtch et al.* (*supra*) that as administrator he had no rights in the tract. In his own right, his settlement and residence since 1886 and prior to Boren's settlement would give him a standing here if he is found to have applied to enter or file on the land, but his prior settlement could be of no advantage to him in the absence of a filing, or an application made therefor. He claims through his application to amend in 1887 his application as administrator made in 1886. I am of the opinion that while he

could not amend said application, still his application was virtually one to file on the land for himself, and may properly be treated so in the absence of an adverse claim, and Boren's claim was not initiated until 1889.

It was decided in the case of *Orvis v. Birtch et al. (supra)* that Orvis could not file on the land because of the fact that prior to his application of 1887 the adverse claims of Birtch, Austin and Rothwell had attached. Birtch has been given that part of the tract claimed by him, and since Austin and Rothwell have waived their rights, and since this application of Orvis to amend in 1887 is held to be practically made as an original application for himself and was made long before Boren's claim was initiated, I must hold that Orvis' claim to the tract is superior to that of Boren who went on the land with full knowledge of Orvis' prior settlement and improvements. I therefore deny the motion for review, and refuse to interfere with the judgment sought to be reviewed.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

EVERETT v. ZIMMERMAN.

A settler who enters into possession of a tract under a claim of title derived through a railroad company, but subsequently, on discovery of the want of title in the company and after December 1, 1882, and prior to the passage of the act of March 3, 1887, renounces such claim, and asserts a right under the settlement laws, is entitled to perfect his claim under the second proviso to section 5 of said act, as against an adverse applicant under the body of said section, through whom the settler first derived possession.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

John E. Everett has appealed from your decision of January 13, 1892, awarding to Uriah Zimmerman the right to purchase the NW. $\frac{1}{4}$ of Sec. 15, T. 4 S., R. 69 W., Denver, Colorado, under the 5th section of the act of March 3, 1887 (24 Stat., 556), as against the pre-emption claim of said Everett for the same land.

The facts necessary to a determination of this case are as follows:

The land is within the limits of the grant to the Denver Pacific Railway Company, now known as the Union Pacific Railway Company. February 6, 1882, the last named company contracted to sell this land to one Kendrick; a part of the purchase money was paid when the contract was executed, the balance to be paid in installments. In November following Kendrick assigned this contract to Uriah Zimmerman.

July 24, 1884, Zimmerman entered into an obligation to convey the land to John E. and C. M. Everett. A part of the consideration was paid at the date of the sale, and notes given for the balance. The

price agreed upon for the land was something over \$5,000, about half of which the Everetts had paid at the time they repudiated their contract, and J. E. Everett applied to make pre-emption filing for the land, as hereinafter set forth.

When these several transactions were had, the land was supposed by all parties to belong to the railway company under its grant.

On June 22, 1885, John E. Everett applied at the local office to file his pre-emption declaratory statement for the tract, he having discovered that there were pre-emption filings of record at the date of the definite location of the line of the road, which filings, under the law as declared in *Dunmeyer v. Kansas Pacific Railway Company* (113 U. S., 629), excepted the land from the grant. June 29th of the same year, he obtained an injunction (presumably temporary) enjoining Zimmerman from assigning the notes of the Everett brothers, which he held for the balance due on the land, alleging the insolvency of Zimmerman and failure of title to the land, etc.

In August following, Zimmerman applied to purchase the land under the act of January 13, 1881 (21 Stat., 315), and afterwards (September 17, 1888,) he also applied to purchase the same under the act of August 13, 1888 (25 Stat., 439).

These applications were refused by the local office, and both parties appealed.

By decision of this Department, April 11, 1890 (10 L.D., 437), a hearing was ordered to determine the rights of the parties in interest. This hearing was had May 26, 1890, and the local officers recommended that Zimmerman be allowed to purchase the land under the 5th section of the act of March 3, 1887, *supra*, and on appeal you affirmed their action. That section is as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the *bona fide* purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said *bona fide* purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which, at the date of such sales were in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

The only question to be considered is, whether Mr. Everett comes within the terms of the proviso to this section: Was he a settler upon

the land subsequent to December 1, 1882, within the meaning of the proviso?

It is contended by counsel for Zimmerman that he can not claim the rights of a settler upon the land, because he was not claiming the right "to enter the same under the settlement laws of the United States," but was in possession in virtue of his title derived from the railroad company, and was therefore estopped from setting up a claim under the settlement laws.

This is, in effect, the position taken by you in your said decision sustaining the action of the local officers.

While it is true that the Everetts entered into possession under claim of title derived from the railroad company, yet it is not disputed that when they discovered that the company had no title to the land, they abandoned this claim, and John E. Everett immediately took the necessary steps to obtain title from the government, the rightful owner of the land. The railroad company's claim having failed, title to the land could be obtained only from the government, through some one of the land laws, for it must be remembered that when John E. Everett applied to file his pre-emption claim there was no law in existence authorizing a purchaser from the railroad to buy the land from the government.

Neither of the statutes through which Zimmerman asserted claim—that of January 13, 1881, or that of August 13, 1888—could afford him any relief, for they had application only to lands that had been withdrawn under the operation of a railroad grant, whereas the land in question had never been so withdrawn, it having been originally excepted from withdrawal for such purpose by valid existing pre-emption filings of record at the date the rights of the company attached, and it was not until the passage of the act of March 3, 1887, *supra*, that the right to purchase land of this description was conferred upon a *bona fide* purchaser from the railroad company. At the date of this act, Everett had been residing upon, cultivating, and improving this land for nearly three years and had been asserting a claim thereto under the pre-emption laws for more than a year and a half. The right to renounce a title that is void and set up an outstanding title that is good is almost a legal maxim. Such a title may be pleaded successfully in ejectment where the question is one of ownership. The moment Everett thus renounced his claim through the railroad title and asserted a claim through the pre-emption law, he became a settler and claimant under the settlement laws, and entitled to the protection conferred by the proviso to said 5th section. Had he continued to occupy this land under the contract of purchase from Zimmerman until the passage of the act of March 3, 1887, he would have been compelled to seek relief under the body of that statute, because he could not have been regarded as a settler under the land laws, so long as he claimed through title derived from the company. This is the distinction be-

tween the case at bar and that of the Union Pacific Railway Company *v. McKinley* (14 L. D., 237), for, as said in that case, "McCabe and Lamb never claimed under any of the settlement laws prior to the passage of said act." In other words, when they first asserted claim to the land from the government, the act of 1887 was in force, which gave to the purchaser from the railroad the right to purchase from the government. On the other hand, when Everett laid claim to this land, there was no right inherent either in himself or Zimmerman to purchase from the United States, except through compliance with some one of the established land laws. Everett resorted to the only means then known to the law by which title could be procured.

There is nothing in the record to show that he took advantage of, or in any manner overreached Zimmerman. He had paid out a large amount of money in the purchase of the land, and had expended other large sums in improving the same, after which he learned that the title through which he claimed was invalid, and the only course left him through which to procure a good title was to proceed to assert his claim through the government. This is exactly what a cautious and prudent man would have done in the premises.

I can not, therefore, concur in your judgment. Zimmerman's application to purchase must be denied, and you will direct that Everett be allowed to make his pre-emption and filing and perfect his entry.

PRACTICE—EVIDENCE—CONTEST—CORROBORATION.

CARTER *v.* BLUNT.

To cure a defect in official proceedings a former local officer, whose term of office has expired, may append his signature to a jurat accompanying evidence that was submitted before him while holding said office.

Where a contest, on an uncorroborated affidavit, is irregularly allowed during the pendency of an order suspending the entry in question, the uncontradicted testimony thus submitted on behalf of the contestant, may be afterwards taken as corroborating the affidavit, and warrant proceeding with the contest when the entry is relieved from suspension.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 7, 1893.

On March 30, 1877, Phineas M. Blunt filed in the Visalia land office, California, his declaration (No. 6) of intention to reclaim the W. $\frac{1}{2}$ of Sec. 10, T. 26 S., R. 24 E., under the provisions of the desert land act of March 3, 1877 (19 Stat., 377), and received the usual certificate of his payment of twenty-five cents an acre for said tract.

On September 12, 1877, all the entries at said office under said act were directed to be suspended by this Department for an investigation as to the character of each tract so entered.

On September 28, 1877, your office suspended said entries in accordance with said directions, which suspension continued in force until February 10, 1891, when it was revoked by your office, by direction of this Department, in the case of *United States v. Haggin* (12 L. D., 34, 41).

On August 28, 1885, Chester M. Carter and William D. McCracken filed their joint affidavit of contest against said entry, alleging that said Blunt had "never appropriated any water, constructed any ditches, or done any act or thing for the reclamation of said land, as required by law, and further that said land is not desert land within the meaning of section 2 of the act of Congress approved March 3, 1877, entitled, "An act to provide for the sale of Desert lands in certain States and Territories."

The object of the filing of said affidavit was stated to be that said affiants might make homestead entries of said tract, said Chester of the NW. $\frac{1}{4}$ and said McCracken of the SW. $\frac{1}{4}$ of said section 10. Said affidavit was not corroborated but the same was received, and upon the same day a citation was issued summoning the parties "to respond and furnish testimony concerning said alleged failure, and the allegation of the non-desert character of said land," at the local office on December 7, 1885. Upon affidavits that said Blunt could not be found, service of said notice was made by publication.

On the day appointed for the hearing the contestants appeared, but the claimant made default. The case was continued to December 8, 1885, when the record shows that the testimony of three witnesses was taken showing that no improvements had been made upon the land, and that the land was then and had been since 1874 in a state of nature. It lies at the sinks of Posa creek in Kern county, California. That the greater part of said land is overflowed in ordinary seasons from Posa creek, and is overflowed every year more or less, and that any part of it would raise a crop of grain in an ordinary season: That there were hundreds of cottonwood and willow trees growing upon the land; that some of the cottonwoods were five feet in circumference, and some of the willows three feet, and ranging from six to twenty inches in diameter. That wire grass and alfalfa grow upon the land naturally, and in sufficient quantity to be cut for hay, and that the land is fair agricultural land and not desert in character. That in 1878 a crop of barley had been raised thereon and cut for hay without irrigation.

The record states that each of these witnesses was sworn, but the jurats are not formally authenticated by the signature of the receiver or register, although each witness signed his testimony.

No decision was rendered by the local officers upon this evidence, but all the papers were sent to your office.

By letter of February 10, 1891, your office promulgated the decision of January 12, 1891, in *United States v. Haggin supra*, whereby the order of suspension was revoked as to this and other entries, and you

directed "that in all cases in which contest was initiated subsequent to date of the order of suspension, and in which the invalidity of the entry is charged, hearings must be had and proof submitted by the contestants showing the invalidity of the entries," and the local officers were directed "to require each contestant to make application for a definite tract of the land in contest, and to take appropriate action on the case." All the papers in this case, including said testimony, were returned to the local officers.

In accordance with these directions said McCracken, on March 2, 1891, filed a formal application to make homestead entry of the southwest quarter of said section 10, and said Carter, on March 5, 1891, filed formal application to make homestead entry of the northwest quarter of said section. Each also executed and filed the affidavits required by law for such entries.

A hearing was ordered for June 13, 1891, as to the "appropriate action" which should be taken by the local officers. The parties appeared, and the contestants asked that Tipton Lindsey, the receiver at the date of submitting the testimony at the first hearing, who was present, be allowed to testify to the fact that the omission of his signature to said jurats was an inadvertence, and that he be allowed to cure the defect. The local officers decided as follows, *inter alia*,—

We do not think it material to inquire whether the record may be perfected at this stage of the proceedings, for the reason that the register and receiver erred in proceeding at all, with the contest, pending the government proceedings.

We conclude that the only action appropriate in this case is to disregard all action taken since the affidavit of contest was filed, and to take up the affidavit of contest and ascertain whether the same alleges grounds of contest and is properly corroborated.

An examination of the affidavit of contest shows that it is not properly corroborated and that the facts therein stated, if admitted to be true, would not justify the cancellation of the entry.

The application to contest of Chester M. Carter and William D. McCracken is therefore rejected and dismissed.

On appeal, by letter of April 26, 1892, you affirmed the decision of the local officers.

An appeal has been taken to this Department.

It would seem from the foregoing history of the proceedings that the substantial merits of the case have been sacrificed to technicalities.

The former receiver might properly have been allowed to append his signature to the said jurats, and thus cure an error in his official proceedings upon the former hearing. The rule is laid down in Throop's Public Officers, Sec. 336, as follows: "In many instances the law allows an officer to do certain official acts, after the expiration of his term, and the surrender of his office to his successor. Such acts consist only of those which are necessary to complete an official act, which he had begun to execute during his term, or to correct errors or supply deficiencies in his official proceedings." See also *Sebrey v. Augustine* (15

L. D., 31). Parties litigant should not be made to suffer for the errors and inadvertencies of the local officers.

The joint affidavit of contest in this case was made before the receiver of the local office. It was not corroborated as required by the rule. Rule 3, Rules of Practice. But this rule is not inflexible. In *Gotthelf v. Swinson* (5 L. D., 657), it is said—

Contests have been allowed where no affidavit has been filed at all where the information upon which the local officers acted was merely verbal, or where it was reduced to writing, but not verified by the oath of the contestant. The rule requiring an affidavit to be filed by the contestant when initiating a contest was only to assure the government of his good faith in the premises. It is always to the interest of the government that entries, in which the laws have not been complied with, should be canceled, and to that end legitimate contests are favored.

See to the same effect, *Seitz v. Wallace* (6 L. D., 299); *Jasmer v. Molka* (8 L. D., 241, 243).

In *Houston v. Coyle* (2 L. D., 58), where there was no corroborating affidavit, it was held that jurisdiction vested in the local office upon notice to the settler, and not by virtue of the affidavit of contest. This doctrine was affirmed in the timber culture contest of *Graves v. Keith* (3 L. D., 309), where there was no affidavit of contest, but only verbal allegations of the informant.

In the present case the testimony submitted upon the first hearing may be regarded in the light of corroborating evidence in support of the affidavit of contest, and in proof of the good faith of the contestants. If that testimony was true—and it is entitled to that presumption,—a fraud upon the government was attempted by the desert land applicant in entering land that was not subject to entry under the desert land act. The government is an interested party in having the truth ascertained.

The charge is in substance that Blunt had never done anything to change the land from its natural state, and that it "is not desert land within the meaning of section 2 of the act" relating to desert land entries. If no change has been made in the land from its natural state, and it is now "not desert land" there is very strong presumption that it was not desert land at the date of the entry. If the contestants prove that at the date when the affidavit of contest was filed the tract was not desert land, and that nothing had been done to change its character since said entry was made, they would prove in effect that it was not desert land at the date of the entry,—at least enough so to put the claimant upon his defense. I think, therefore, that the "appropriate action" that should have been taken by the local officers at the hearing before them was to have proceeded with the trial of the charges, with the view of ascertaining the character of the land at the date of the entry. You will therefore direct that course to be taken by the local officers at a hearing to be hereafter ordered, at which all parties in interest should be summoned to appear.

Your judgment is modified accordingly.

PRACTICE—APPLICATION FOR CERTIORARI.

SHANKLIN *v.* WORMMOUTH.

The oath required in support of an application for certiorari must expressly aver the truth of the allegations contained in said application.

Secretary Smith to the Commissioner of the General Land Office, July 7, 1893.

On the 23d of February, 1893, you transmitted to the Department a petition for certiorari, filed by the attorneys for J. W. Shanklin, in the case of the said Shanklin against Ebenezer Wormouth, involving land in the San Francisco land district, California.

You rendered a decision in the case on the 29th of November, 1892, in which you discussed the appeal of Shanklin from the decision of the local officers, treating the same as a mere protest, filed by Shanklin in behalf of the government, he having no interest in the land, and no copy of his appeal or protest having been served upon the defendant.

On the 2d of December, 1892, he filed an appeal to the Department, from your said decision, which you declined to transmit, holding "that an appeal does not lie on the part of Mr. Shanklin from the action aforesaid of November 29, 1892."

Such action was taken by you on the 26th of January, 1893, and you directed the local officers to advise Shanklin that the case would be held open for the period of twenty days from the service of notice of your action, in order that he might avail himself of any rights he might have under practice rules 83 and 84.

He availed himself of the privilege thus accorded, and his application for a writ of certiorari is now before me. Rules 83 and 84 of practice read as follows:

RULE 83.—In proceedings before the Commissioner, in which he shall formally decide that a party has no right of appeal to the Secretary, the party against whom such decision is rendered may apply to the Secretary for an order directing the Commissioner to certify said proceedings to the Secretary and to suspend further action until the Secretary shall pass upon the same.

RULE 84.—Applications to the Secretary under the preceding rule shall be made in writing, under oath, and shall fully and specifically set forth the grounds upon which the application is made.

In the case before me, the application is in writing, and fully and specifically sets forth the grounds upon which it is made. The only oath connected with it is the affidavit of one of the attorneys making the application, in which he says that "the foregoing and attached motion is made in good faith, and not for the purpose of delay." The affidavit makes no allusion to the statements contained in the application, and in no respect certifies to their truth. It is simply the affidavit required by Rule 78, in the case of motions for rehearing or review, and does not meet the requirements of Rule 84.

In dismissing a motion for certiorari on account of precisely the same defect, in the case of *Price v. Schaub* (16 L. D., 125), it was said:

A compliance with that Rule (84) would require an "oath", such as is attached to a verified pleading in courts, that "the statements therein contained are true, to the knowledge of deponent, except as to the matters therein stated upon information and belief, and as to those matters, deponent believes them to be true."

In that case there was a motion to dismiss, on account of the defect mentioned, while in the case at bar, the attorneys for Wormouth formally waive any reply to the motion, and ask that it be disposed of without delay.

The Rules of Practice were adopted for the government of the Department and subordinate offices in land cases, and attorneys having such cases in charge must comply with said rules, or suffer the consequences of a disregard thereof.

The application before me is not in compliance with Rule 84 of the Rules of Practice, and it is therefore dismissed.

PRACTICE—MOTION FOR SECOND REVIEW.

FLORIDA CENTRAL AND PENINSULAR R. R. CO.

No action will be taken on an application for the second re-consideration of a case, where no new facts are set forth therein, or new points of law suggested.

*Acting Secretary Sims to the Commissioner of the General Land Office,
July 14, 1893.*

On February 15, 1893, Secretary Noble approved certain lists of lands to the State of Florida, for the benefit of the Florida Central and Peninsular Railway Company, under the act of May 17, 1856 (11 Stat., 15), granting land to said State to aid in the consideration of a railroad "from Amelia Island on the Atlantic to the waters of Tampa Bay, with a branch to Cedar Keys on the Gulf of Mexico."

On March 2, 1893 (16 L. D., 217, 229), Secretary Noble, in an elaborate opinion, reviewed the facts and the law relating to said grant, the benefit of which is claimed by said company, and all the objections urged against its claims, and gave the reasons for his action in approving said lists. Subsequently a motion was filed by the Hon. Wilkinson Call, United States Senator from Florida, asking that the said action of the Secretary be revoked and set aside, and thereupon the present Secretary directed that action upon said approved list be suspended until he could examine into the matter complained of. After hearing oral argument for the greater part of three days on the questions involved, or supposed to be involved, and after a careful consideration thereof, on July 7, 1893, 17 L. D., 6, Secretary Smith decided that he could see no reason to revoke the action of his predecessor; and he rescinded the order of suspension theretofore issued. On the next day, July 8, 1893, Senator Call, in his "official capacity as a Senator of the State of Florida," filed

a motion for re-review of said decision, asking that "an opportunity may be allowed for a further presentation of the facts involved" therein, and a further suspension of the order of approval of said lists.

The grounds for this new application, where any are specified, are substantially the same which have heretofore been repeatedly examined and passed upon by this Department in the numerous decisions heretofore rendered by it in this prolonged case; and some other matters are referred to in a general and indefinite manner, which the Department has several times decided to have no bearing whatever upon the questions involved.

This matter has been before this Department, and this company has been clamoring for its rights, for many years, and it would seem that the point has now been reached where so far as executive authority is concerned the controversy must be closed, if that time is ever to be reached.

On April 29, 1876, Secretary Chandler made a decision in the matter adverse to the claims of the company. But on January 28, 1881, Secretary Schurz, in a review of said decision, reversed the same, and sustained the claims of the company, showing that the decision of Secretary Chandler was based upon an incomplete record. The matter came before Secretary Teller, who, on January 30, 1884, (2 L. D., 561), affirmed the rulings of Secretary Schurz.

It came before Secretary Lamar, who, on August 30, 1886 (5 L. D., 107), concurred in the two previous decisions, and followed them, and the whole matter was elaborately reviewed by Secretary Noble on March 3, 1893 (16 L. D., 217), and the former rulings adhered to; and lastly, the matter was argued before Secretary Smith very fully, for the greater part of three days, patiently considered by him, and the former decisions sustained. It would seem that during all this long period of litigation, and the frequent examinations made by the Department, ample opportunity has been afforded Senator Call, who represented, and now represents, the opposition to, and antagonizes the claims of the company, to present any fact or argument which exists in support of his contention.

Under the circumstances I must decline to further consider the application of Senator Call, which seems to be based alone upon the assumption of errors in the former decisions. No new facts are set forth, no new points of law suggested, but the motion seems to be presented simply for the purpose of obtaining a re-argument of matters so often decided, in the decision of which the applicant does not acquiesce. If this application is now to be received and considered, there is no reason why such applications may not be continued indefinitely and the rights of parties practically denied.

In the case of *Neff v. Cowhick* (8 L. D., 111), it was said—

Motions for a re-review, or a second reconsideration of a decision, should not be allowed, and the practice of permitting them to be filed ought to be discontinued.

The Department ought not to be asked to consider the same points involved in a case but twice. It is natural to litigants, and occasionally happens to counsel, to see with an exaggerated estimate of their strength the importance of the points which make in their favor and to attribute the failure of a like perception of them to the Department, or by courts, when the causes are depending in courts, to an inattention to such points. The overburdened condition of the appellate business of the Department would be reason enough, if there were not still better ones for inhibiting the gratification of this feeling by allowing second motions for reconsideration, with the consequent labor and delay. Hereafter, let the rule be that no motion for a re-review shall be filed. If the defeated party is able to present any suggestion of fact or points of law not previously discussed or involved in the case, it may be done by petition, which shall contain all the facts and arguments. On the filing of such petition, if it appears important, the Secretary will make such order for recalling the case from the General Land Office and such direction for further hearing as may be necessary. Otherwise, no further action on the petition will be taken. It will be regarded merely as in the nature of information by which the supervisory jurisdiction of the department can, if desirable, be set in motion. Such petition should not re-argue points already twice passed upon, but should be limited to the office indicated of suggesting new facts or considerations not before presented.

The application of Senator Call clearly comes under this rule, and will be governed by it. No further action will be taken upon it, and it is sent to you to be kept with the other papers in the case.

MINERAL LAND—ASSAY CERTIFICATE.

DOBLER ET AL. *v.* NORTHERN PACIFIC R. R. CO. ET AL.*

An ordinary assay certificate does not establish the value of a vein of mineral as an entirety.

The burden of proof is with a mineral claimant for land returned as agricultural to show as a present fact that the land is mineral in character, and more valuable for mining than agricultural purposes.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 13, 1893.

The land involved in this appeal is a part of Sec. 33, T. 10 N., R. 3 W., Helena, Montana, land district, designated as the King Lode, mineral survey No. 3103.

The record shows that Leopold Dobler *et al.*, made application for patent for the King Lode, September 30, 1890, and the same was rejected "for the reason that the land applied for is covered by Northern Pacific Railroad selection No. 11." On November 8, following, he filed petition alleging the mineral character of the land and asked for a hearing to determine it and the rights of the applicants thereto. A hearing was accordingly had before the local officers, when A. J. Steele appeared setting up his title to the land by purchase from the railroad company, and by consent of all parties allowed to intervene. The register and receiver in an elaborate and well considered opinion decided the "land is

* Not reported in Vol. XVI.

not proven to be mineral in character and the application should be rejected." The applicants appealed and you by letter of May 27, 1892, reversed their decision, whereupon the railroad company appealed assigning as error, substantially that your decision is against the evidence.

The return of the surveyor-general is that the land is agricultural in character. Therefore the burden of proof in establishing its mineral character rests upon the mineral claimant. The land is located about two miles from the center of the city of Helena and it is shown that one of the suburban additions to that city corners on this tract and that there is on this addition a number of valuable residences.

It is shown that the King Lode was located in May, 1888; that in August, 1890, it was relocated "for the purpose of more accurately defining the boundaries of the ground claimed." The ground claimed is approximately the same as that included in an old location known as the "Knights of Labor" lode, made in 1886, and upon which there had been some work done.

There is practically no dispute as to the improvements. They consist of three shafts, and a cabin in which the claimant and his family reside. Shaft No. 1, the discovery shaft, is five by five ft. thirty-three ft. deep, timbered; shaft No. 2 is twenty-three ft. deep, four by four timbered, and No. 3, is thirty-five ft. deep, four by four timbered, which, however, contains water and is used as a well. These improvements are variously estimated at from \$750 to \$1300. Dobler claims that he made a discovery of mineral before he made his location; that shafts 1 and 2 are sunk on a vein bearing gold, silver and copper. He says the land has no value for agricultural purposes, it being broken and rolling and part of it in the foothills. On cross-examination he says that the vein dips south and its trend is east and west; that he had assays made showing from \$1, to \$4.38 cents per ton. When asked if he had not stated within the last three days that the best assays he could get were about one dollar, he refused to answer the question. He has never shipped any ore; has two or three tons on the dump; that he has one solid wall of granite and a line hanging wall, but it is soft. He does not think miners' wages can be earned by removing the ore; that it will not pay expenses for working; has been engaged in developing it for three years.

The five witnesses for the mineral claimant substantially corroborate his testimony. I do not consider it necessary to quote them at any length. Suffice it to say that they all agree that in its present condition it will not pay to work; that they consider it a good prospect and on further development will be of value for its mineral. During the progress of the trial Dobler had an assay made which shows gold and silver of the value of \$13.92 per ton.

It seems to me that the testimony on behalf of the mineral claimant is insufficient to establish the mineral character of the land. He has shown that for several years the land had been worked with the view

of developing mineral, yet as a matter of fact, there has been no production whatever, and the only indication of mineral is the result of two assays. I take it that it is a matter of common knowledge that an ordinary assay certificate does not establish the value of a vein of mineral. The most that can be said for it is that it indicates the presence of mineral in the particular piece of matter under treatment, and it is not any evidence of the value of the vein as an entirety. The rule has been often announced by the court and the Department that it must be shown by the mineral claimant as a present fact that the land is mineral in character and more valuable for mining than agricultural purposes. (*Cutting v. Reininghaus et al.*, 7 L. D., 265; *Davis v. Weibbold*, 139 U. S., 507). It seems to me that Dobler has failed to make this showing. The evidence shows that the land is within four miles of a smelter, and it would seem that if there were any ore, the conditions were favorable for actually demonstrating that fact.

Aside from this, however, an equal number of witnesses for the defendants, entitled to the same credibility, testify that the land is good for grazing purposes, and has no present value for mineral. They admit that there is mineralized matter in the shafts in pockets, but deny that there is any vein or defined walls. They say there are no evidences of gold or silver and whatever mineral there is, is iron in small quantities.

Remembering that the burden of proof is on the mineral claimant, the land having been returned as agricultural, I think it must be decided that he has failed to establish its mineral character.

The testimony having been taken before the register and receiver, who had an opportunity to see and hear the witnesses and to observe their demeanor on the stand, could judge of their credibility and decide who are most worthy of credit. Their joint opinion under such circumstances is entitled to special consideration, and on questions of fact will not be disturbed unless clearly wrong. (*U. S. v. Montgomery*, 11 L. D. 484; *Searle Placer* (id., 441).

Your judgment is therefore reversed.

PRIVATE CLAIM—SURVEY—CONTRACT.

RANCHO AUSAYMUS Y SAN FELIPE.*

The survey of a private claim having been duly made according to law, and so decided by the proper officers of the Department, their authority in that respect is thereby exhausted, and they can not rightfully order another survey of said claim.

The Commissioner of the General Land Office has the authority to locate on the ground the boundary line of a patented private claim, if such action is practicable and necessary in order to close the surveys of the public lands, and to use for that purpose so much of the appropriation for the survey of the public lands as may be required.

* Not reported in Vol. xvi.

A contract by which an officer of the government is to receive pay from private parties for doing public work, in the result of which they are interested, should not be approved.

Secretary Smith to the Commissioner of the General Land Office, June 29, 1893.

The Rancho Ausaymus y San Felipe, a Mexican private land grant, situated in California, was surveyed by deputy Washington in April, 1858, and patented September 18, 1858. The public surveys were not then closed on the east line of the grant. Subsequently your office directed this to be done, and a contract was made with a deputy "to mark and establish all lines necessary for a resurvey of the east boundary of the rancho and the closing of the public surveys thereon." At this time it was contended by the grant owners that said east line was located too far to the west; this claim was resisted by certain settlers on the adjoining public lands. These contending parties agreed upon a compromise line, but your office declined to approve thereof; and, on appeal this Department affirmed your decision in the premises and held that we were without authority to change a survey which has been carried into patent (14 L. D., 557).

By your letter of January 12, 1893, I am informed that, upon investigation, it has been ascertained from the records of your office, the patented east line was only established by computations based upon triangulations, and that there is nothing to determine the boundary except the northeast and southeast corners of the grant, as established by deputy Washington and carried into patent, and it will be impossible to close the public surveys upon the grant unless said eastern line is actually run in the field and first properly established; that whilst the closing of the public surveys would be paid for out of the regular appropriation for the survey of the public lands, there is no appropriation for the survey of private land claims in California, and consequently no money at your disposal to pay for surveying said east line of the grant. It is further stated that the grant owners paid for the survey of the grant before they received the patent, as required by law, but are willing again to pay for the running and establishing of the east line, if the same may be lawfully done, and your letter is for the purpose of obtaining the advice of this Department as to whether it would be lawful for the surveyor General of California to contract with some competent deputy with the approval of your office, for the proper establishment of said boundary line, and the closing of the public survey thereon, the cost of the latter to be chargeable to the survey of public lands, and the cost of the former (the grant boundary) "to be paid by the grant owners as may be stipulated between them and the said deputy."

The descriptive notes showing the corners and distances of the survey, and which are copied into the patent, would rather indicate that

the eastern line was run in the field. For after establishing the NE. corner, the notes say—

Thence south seven degrees fifty seven minutes west, three hundred and eighty-nine chains *over* very rough and mountainous country to a post marked F No. 2 in a mound with trench and pits. Station and southeast corner of this Rancho.

An examination of the field notes of the survey, however, support your statement that said line was “only established by computations based upon triangulations,” except the distance of twenty-three chains, which was measured upon the ground. The surveyor states that the ground was so rough and broken as to render chaining impracticable. The same notes show that the greater part of the northern boundary of the grant was surveyed in the same manner and for the same reason. The survey thus made was approved by the surveyor general, with the field notes before him, and afterwards, by your office.

The survey of the grant must therefore be assumed to have been properly made, as the surveyor says it was “impracticable” to make it otherwise. The survey having been properly made, the government has acquitted itself of all obligations in that behalf to the grant owners, and they can have no claim, either legal or equitable, upon it, because the work paid for was not done, or was improperly done. It is apparent from this that any contract now made by the United States for the survey of the line of said grant, as a grant, would be in violation of the prohibition contained in section 3732, Revised Statutes, which provides that—

No contract, or purchase, on behalf of the United States, shall be made, unless the same is authorized by law, or is under an appropriation adequate to its fulfillment, etc.

The survey having been duly made according to law, and so decided by the proper officers of the Land Department in the most solemn manner, their authority in that respect is exhausted, and they can not rightfully order another survey of said rancho. Any contract for that purpose would be beyond and unauthorized by law, and ought not to be approved by you, even though the above cited section of the Revised Statutes had never been enacted.

Were the United States under any obligation to the grant owners to survey or resurvey said east line, I could not approve of the proposed arrangement by which it is to be permitted that an officer of the government shall receive pay from private parties for doing public work, in the result of which they are interested. Such an agreement does not commend itself to me as in the line of good administration, to say the least of it.

It seems to me there ought to be no question as to your authority to locate, upon the ground, this line of the grant, if it be practicable to do so, and it is necessary in order to properly complete and close the surveys of the public lands; and to use for that purpose so much of the

appropriation for the survey of the public lands as may be necessary for the purpose.

"From the earliest days matters appertaining to the survey of public or private lands have devolved upon the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior," said the late Justice Lamar, delivering the opinion of the supreme court in *Cragin v. Powell* (128 U. S., 691, 697). And section 453, Revised Statutes, requires that officer to "perform . . . all executive duties appertaining to the surveying . . . of the public lands." The rule is too well settled to be controverted, or to need citations to sustain it, that an authority conferred upon a public officer is construed to include all the necessary and usual means of executing it with effect. *Encyclopedia of Law*, Vol. 19, 457. Such additional powers as are necessary for the due and efficient exercise of the powers granted are to be implied from the statute granting the express powers or imposing the particular duty. *Throop on Public Officers*, p. 515.

Under the law you are charged with the duty of having the public lands properly surveyed. In the present instance the survey cannot be properly made and closed, as undoubtedly it should be, without connecting it with the east boundary of the grant. To do this, that boundary must be found. Can there be any doubt about your duty and authority to find or establish that line, if it be practicable? I think not. And, this work being done for the purpose of surveying the public lands which cannot otherwise be properly surveyed, I am clear in my opinion that the expense thereof will be properly payable out of the appropriation for the survey of the public lands, and I so direct.

In giving instructions for this survey, you will be careful to make it plain that no other line can be recognized or established than the line as described in the grant patent.

PRACTICE—RE-REVIEW—CERTIORARI—PROTEST.

HOPELY ET AL. *v.* MCNEILL ET AL.

A motion for the review of a decision refusing a writ of certiorari should not be considered as such, but treated as a petition for the exercise of the supervisory authority of the Secretary; and a motion for the re-review of said decision should also be regarded as such a petition.

A protest may be dismissed if not corroborated, but such action should not prevent the consideration of a second protest, properly corroborated, by the same party, even though the charges therein are the same as those contained in the first.

Acting Secretary Sims to the Commissioner of the General Land Office,
July 15, 1893.

With letter of December 7, 1892, there was transmitted to the Department a paper entitled "Petition to the Honorable Secretary of the Interior for the exercise of his supervisory powers," filed in behalf of

Hopely, *et al.*, in the case of Alfred L. Hopely, *et al. v. John McNeill, et al.*, involving mineral entry No. 131, Centre Lode, Colorado Springs, Colorado.

The attorneys for McNeill, *et al.* have filed an answer to this petition.

It seems necessary to recite at some length the history of this case, as set forth in the papers now before me.

The entry in question was made September 5, 1887, and in December following, Hughes and Patterson, as owners of the "Best" lode claim, filed a protest against said entry, which protest was, on April 28, 1890, dismissed by your office, it being said:

These allegations being entirely uncorroborated, are not sufficient to overcome the evidence filed by the claimants in said case.

As no adverse claim was filed during the period of publication, and as the proceedings in said M. E. 131 appear to have been regular, as required by Sec. 2825, Rev. Stat., said protest is hereby dismissed, and you will so notify said protestants.

On April 14, 1892, Alfred L. Hopely, *et al.*, as owners of the "Best" lode, filed a protest against said entry, which was dismissed by your office, by decision of May 2 following, it being said:

Protestants allege a prior right to a part of the ground covered by the Center claim, calling it the Best Lode claim, this being substantially the same protest as that filed on December 18, 1888, by William Petterson and E. A. Hughes, for themselves and co-claimants A. K. Hopely, Chas. A. Marshall and Mrs. N. J. Ross, which was dismissed by office letter of April 28, 1890, as insufficient to warrant an investigation by this office, and for the further reason that the allegation contained therein, if true, should have been made the basis of an adverse claim.

No new feature being presented in the protest under consideration, the same is accordingly dismissed, and the right to appeal denied.

A motion for review of this decision was denied on May 28, 1892. On June 1, 1892, said Hopely, *et al.* filed an application for a writ of certiorari, and on August 3, filed an amendment to said application. On August 18, this Department denied the petition for the reason that no copy of either protest was presented, and that the petitioners had not made such a *prima facie* showing as to raise a reasonable presumption of error or oversight on the part of your office, or to convince the Department that its intervention is requisite for the prevention of injustice. On September 3, 1892, a motion for review of this decision was filed, urging that inasmuch as no mention was made of the amended petition, and copies of papers accompanying the same, it was evident that the said papers were not before the Department when the decision complained of was made. This motion was denied by decision of November 19, 1892, from which decision I quote the following:

No copy of the protest of December 18, 1888, is transmitted with the papers, so that this Department cannot determine whether the present protest is substantially the same as that or not, from an inspection of the papers.

The rule is, that the applicant for a certiorari must invariably make a *prima facie* showing of matter for supervision and requiring Departmental intervention. William Fuller, (2 L. D., 215).

Your decision, that the two protests are "substantially the same", must stand as a proper adjudication of that question, in the absence of any showing to the contrary.

The petition now under consideration invokes the exercise of the supervisory powers of the Secretary of the Interior, and as grounds therefor alleges errors in the previous decisions as follows:

First. In holding that the absence of a copy of the protest of December 6, 1888, made it impossible for you to determine, from an inspection of the papers that were furnished, whether or not the two protests are substantially the same.

Second. In not holding that the copy of Commissioner's decision of April 28, 1890, dismissing the protest of December 6, 1888, on the technical ground that said protest was *entirely uncorroborated* (a copy of which we furnished with our original application), constituted a sufficient showing, in support of our said applications, of the character of said original protest.

Third. In not finding that the Commissioner's decision of April 28, 1890, (a copy of which was before you) holding that said protest of December 6, 1888, was "entirely uncorroborated", and fatally defective for that reason, constituted a fact appearing in the record, and uncontradicted, of which you were bound to take notice.

Fourth. In not holding that said protest of December 6, 1888, which is shown by Commissioner's decision of April 28, 1890, to have been "entirely uncorroborated", could not be identical with the duly corroborated protest of April 14, 1892, (a copy of which was before you).

Fifth. In not holding that the paper filed December 6, 1888, purporting to be a protest, but "entirely uncorroborated", and for that reason rejected by the Commissioner, was *in fact not a protest*, and not entitled to consideration on its merits, under the Rules of Practice.

Sixth. In not holding that, inasmuch as said protest of December 6, 1888, was fatally defective in form, such defect never having been cured, said protest was rightfully rejected and is not now entitled to consideration as affecting the rights of the present protestants.

It was error to consider the paper filed as a motion for review as such, as it should have been treated as a petition for the exercise of the supervisory power of the Secretary, Oscar T. Roberts, (8 L. D., 423). So this paper now presented will not be entertained as a motion for re-review, but will be considered as a petition invoking the supervisory powers of the Secretary. It was not error in your office to dismiss the first protest on the ground stated, that is, that it was uncorroborated, and that decision was acquiesced in by the protestants. This action could not prevent the filing of a second protest in proper form, and it was error in your office to dismiss the second protest, it being in proper form, because it made the same charges as did the first. When the matter was presented to this Department on petition for certiorari, that mistake of your office should have been corrected, but at the time of its consideration, no copy of the second protest was among the papers, and hence it was impossible to determine whether that protest was sufficient. Under these circumstances, nothing could be done, other than what was, that is, the dismissal of the petition. It was afterwards shown, however, that a copy of said second protest had been filed before that departmental decision was rendered, but for some reason, had not then reached its proper place among the papers of the case. When the motion for review of that decision was filed, the facts were all presented to the Department. It was shown that the first protest

was dismissed, not upon its merits, but because it was not corroborated, that is, that it never became entitled to be considered on its merits, and that the second was dismissed because the charges contained in it were the same as those in the first. Under these circumstances, it made no difference whether the charges in the two protests were substantially the same, because the sufficiency of the charges in the first had never been passed upon. The error that your office had fallen into, of dismissing the second protest because its charges were the same as those of the first, when the sufficiency of those charges had never been considered, was plainly presented by the papers then before the Department, and hence it was a mistake to deny that motion on the ground that such action was taken, namely that it was impossible to determine whether the charges were the same. The mistake made in your office should have been pointed out, and the merits of the petition for certiorari considered. Because of the mistakes herein pointed out, the decisions of this department heretofore rendered are hereby set aside, and the case will be considered as if those decisions had not been made.

This petition and exhibits show that the reason given for refusing to consider the second protest, was not a sound one, and that the sufficiency of the charges made, to justify a hearing, should have been considered by your office. The fact that no adverse claim was filed is mentioned by your office, although not made a special ground for refusing to entertain the protest, nor would that fact be conclusive against the protest, since it charges failure to do the amount of work required and other failures to comply with the law that might furnish sufficient grounds for further investigation. Whether a hearing should be had cannot be determined without an inspection of the record in the case in connection with the protest. In view of the apparent mistake in your decision, and the gravity of the charges made, I am of the opinion that the matter should be considered in this Department, and will therefore grant the petition for certiorari.

You will therefore transmit the record in said case, and give the parties notice of this decision.

PRACTICE—REVIEW—CERTIORARI—MINING CLAIM—DISCOVERY.

WATERLOO MINING CO. *v.* DOE.

A motion for the review of a departmental decision denying a writ of certiorari, should not be regarded as such, but may be treated as a petition invoking the supervisory authority of the Department.

In the exercise of its supervisory authority an application for a writ of certiorari may be allowed by the Department, even though the applicant is not entitled to be heard on appeal.

The "discovery" of mineral within the limits of a lode claim is a statutory prerequisite to the location thereof.

A properly corroborated protest against a lode claim specifically alleging non-discovery, warrants a hearing although the report of the deputy mineral surveyor accompanying the claimant's application for patent may show the existence of ore in "streaks and kidneys" in various parts of the claim.

*Acting Secretary Sims to the Commissioner of the General Land Office,
July 15, 1893.*

This is a motion by the Waterloo Mining Company for a review of the departmental decision, dated November 16, 1891, in the case of said company *v.* John S. Doe, involving the Oriental No. 2, lode claim, Los Angeles, California.

On December 22, 1887, Doe made mineral entry based upon an amended location for said claim.

On May 17, 1889, a protest, and on December 5, 1890, an additional protest was filed against this entry by the company named.

By decision dated May 26, 1891, you refused to order a hearing and dismissed said protest and July 1, 1891, declined to forward the appeal filed by said company from such action. Thereupon the company applied for *certiorari*. This application was denied by the decision complained of in the pending motion. While, therefore, said motion can not be considered as such, it can, for reasons that will hereafter appear be treated as a petition invoking the supervisory authority of the Department. Oscar T. Roberts (8 L. D., 423).

The protestant is the owner of the Silver King quartz mine (mineral entry No. 59, by Charles F. Bradley *et al.*, July 20, 1887) for which patent was issued January 10, 1891, and which it appears is contiguous but not in surface conflict with the Oriental No. 2, the claim here in question.

In its application for *certiorari* the protestant alleged that the vein upon its Silver King claim "passes outside of the vertical side lines of the surface location of the Silver King but within the vertical plane of the end lines thereof," and that it accordingly has an interest in mineral under the surface of the Oriental No. 2.

The Department held that if this be so, a patent for the Oriental No. 2, could not affect the protestant as its rights were protected by law, (Sec. 2322 R. S.); that having failed to assert an adverse claim within the statutory period "it must be assumed that the defendant is entitled to a patent," and that the protestant could not be heard unless "it can be shown that the defendant has failed to comply with the law."

It appears that the protestant assailed the validity of the Oriental No. 2, location on the ground that no vein or lode had been discovered "within the limits of the claim thus located prior to the location thereof;" that it filed in support of the charge so laid in its protest, several affidavits, including that of the original locator, and that it was also shown by said affidavits that "no such vein or lode exists *except* as a future development of the Silver King vein may demon-

strate that such latter vein upon its dip crosses underneath the surface ground of the Oriental No. 2, claim."

In your said letter of May 26, 1890, dismissing the protest, you admitted that "it does not appear that a vein or lode had been discovered prior to the location of the claim," but found the allegation unimportant because the deputy mineral surveyor had in his report accompanying the field notes and filed with the application for patent, said "The Oriental No. 2, quartz mine is silver bearing in porphyry bedrock. I believe no regular ledge has been discovered but ore is found in streaks and kidneys in various parts of the claim." You held that by this report the claim was shown in the absence of an adverse claim to be properly subject to sale as a lode claim. In support of this conclusion you cite Commissioner Drummond's letter of July 15, 1873, to surveyors-general and registers and receivers (Copp's Mineral Lands, 62), to the effect that the statute, act of May 10, 1872 (16 Stat., 217), did not use the terms vein, deposit, etc., in their strict geological signification, that the plain object of the law being to dispose of mineral lands for a money value "whatever form of deposit can be embraced in the general phrase 'vein or lode of quartz or other rock in place' must be sold at the rate of five dollars per acre."

Concerning the defendant's compliance with the law, it was said in the decision complained of:

The protestant has made its objection before you, and has been heard, but has not shown such failure on the part of the defendant as amounts to a non-compliance with the terms of the statute. Such non-compliance was the only question upon which it had a right to be heard as a "third party," and having failed in that hearing to make good its objections, and not being a party in interest, it was not entitled to pursue the matter further by an appeal.

The pending motion is based upon the following allegations of error:

First.—In assuming applicant's right to patent because of protestant's failure to file adverse claim thereto, as provided by law, during the period of applicant's publication of notice of his application for patent.

Second.—In assuming that protestant can not be heard "unless it can be shown that the applicant has failed to comply with the law," whereas, the ground of said protest, as defeating applicant's right was and is the failure of said applicant and his predecessors in interest to comply with the plain and positive requirements of the mining law.

Third.—In ruling that protestant has failed to show non-compliance by the applicant for patent "with the terms of the statute," and in assuming that "hearing has been had on the subject matter of said protest" whereas, such hearing has not been had in fact.

Section 2325, R. S., provides when no adverse claim is filed within the prescribed period, no objection from third parties shall be heard, "except it be shown that the applicant has failed to comply with the terms of this chapter."

The entryman, Doe, seeks to acquire the claim in question under the same section which prescribes the method of obtaining title for "any land claimed and located for valuable deposits."

When, as in the case at bar, patent is sought for a lode claim such valuable deposits are defined as "veins or lodes of quartz or other rock in place bearing gold, silver," . . . etc., and the "discovery" thereof within the limits of the claim is made a prerequisite to its location. Sec. 2320 R. S.

When, therefore, the protestant made its said charge of non-discovery it of course charged a failure "to comply with the terms of this chapter." This charge having been specifically made and properly substantiated the protestant was entitled to an opportunity to prove it. Such opportunity has, however, been denied. You found said charge unimportant because the ground was shown by the deputy mineral surveyor's report to be properly subject to mineral entry. This was manifest error, for without discussing the merits of such conclusion, said report was at best simply a contradiction of protestant's charge. The issue so made up was one of fact that could not be properly determined upon the record before you, and it was also one which called for an order of hearing. It follows that in finding that the protestant "had been heard" and had failed to show a "non-compliance with the terms of the statute" the decision now complained of was erroneous.

Said decision, however, proceeds on the theory that being without interest and not entitled to appeal, the protestant who has been denied his day in court, must be refused the writ applied for. Waiving the question of the protestant's right to appeal, I can not agree in the opinion that his application for certiorari should be denied.

In the case of *Petit v. Buffalo Gold and Silver Mining Co.* (7 L. D., 494), you refused to submit an appeal by the protestant Petit, from your action refusing a rehearing, on the ground that she stood solely in the relation of *amicus curiæ*. In considering Petit's application for *certiorari* the Department, reserving for consideration her right to appeal, found her allegations that the

claim as surveyed, applied for, and entered does not fall within the limits of the claim as located nor follow the course of the vein (to be of) so serious a character, asserting a failure to comply with essential pre-requisites to the obtaining of a patent, that a proper case is presented thereby, if true, for the exercise of that just supervision which the law vests in the Secretary of the Interior over all proceedings instituted to acquire portions of the public lands: a supervision which should be exercised whether the information which puts it in motion is laid before the Secretary formally or otherwise.

In the case at bar the allegations stated are analogous to those that were made in the case cited, and are equally serious. The character of the claim in question has not been properly ascertained, although the question has been properly presented, and it is the duty of the Department to determine such question. *Royal K. Placer* (13 L. D., 86).

Upon the whole case, therefore, I am of the opinion that a sufficient reason exists for an exercise of the supervisory authority of the Department. The said departmental decision of November 16, 1891, is accordingly hereby revoked, and you are directed to certify the record to the Department for appropriate action.

CONFIRMATION--DOUBLE MINIMUM LANDS.

HENRY R. BOZEMAN ET AL.

A desert land entry of double minimum lands allowed at single minimum, is confirmed under the body of section 7, act of March 3, 1891 if otherwise within the terms of said statute.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 19, 1893.

On the 30th of June, 1886, Henry R. Bozeman made final proof and payment, under the provisions of the desert land act of March 3, 1877, (19 Stat., 377) for the NW. $\frac{1}{4}$ of Sec. 8, T. 17 S., R. 22 E., M. D. M., Visalia land district, California.

His application for the land was made May 30, 1877, and his proof showed thorough reclamation the following year. His entry was suspended, with many others, for several years, so that final receipt and certificate were not issued until the 30th of June, 1886.

On the 22d of September, 1892, you passed upon said final proof, and finding that the land was within the twenty-mile limits of the Southern Pacific Railroad, you directed the local officers to require the claimant to make an additional payment of \$1.25 per acre.

The case is brought to the Department by an appeal from your decision, taken by Adolph Levis, transferee of Bozeman, who alleges that your decision is contrary to law, in that he is a purchaser of said land in good faith, for a valuable consideration, his purchase having been made after final entry, and prior to March 1, 1888, and that no fraud on his part has been charged, or found by a government agent upon an investigation.

This brings the case within the provisions of section seven of the act of March 3, 1891, (26 Stat., 1095) which confirms such entries, and deprives your office of any jurisdiction, or of the power to exercise authority in the case.

In connection with his appeal, Levis makes oath that he was not only the purchaser of said land for a valuable consideration, on the 29th of October, 1886, but that he is still the owner thereof. This is not sufficient proof to satisfy the requirements of the circular of instructions of May 8, 1891, (12 L. D., 450) but upon the proof therein required, being furnished to your office within ninety days after service of notice of this decision, upon the parties in interest, patent will issue for the land, as provided in said act of March 3, 1891.

The decision appealed from is accordingly reversed.

PRACTICE—ORDER FOR REHEARING.

PATRICK *v.* DAVIDSON.

A plea of poverty in excuse of failure to present evidence at the hearing can not be accepted as justifying an order for a rehearing.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 20, 1893.

On March 2, 1888, you directed the cancellation of C. W. Davidson's timber culture entry for the NE. $\frac{1}{4}$ of Sec. 3, T. 8 N., R. 42 W., Oberlin land district, Kansas.

On April 18, 1888, Malcolm Patrick, the successful contestant, was allowed to make timber culture entry of the tract.

Davidson filed affidavit setting forth that he had never had either legal or actual notice of the hearing until it had been had and judgment rendered; that notice was given by publication while he was residing in the State, and the contestant knew his whereabouts; and that if given a rehearing he could and would prove by credible witnesses that he had fully complied with the law.

It being already shown that jurisdiction had not been acquired in the first instance, you ordered a rehearing, to be had on April 9, 1891. At said hearing Davidson was present, but Patrick made default—appearing neither personally nor by attorney. The case was dismissed for want of prosecution. Patrick appealed from this action to your office, asking to be allowed another hearing. You affirmed the action of the local officers, and he now appeals to this Department.

The appellant sets forth his reasons for not being present at the hearing as follows:

Malcolm Patrick was not able to comply with the prescribed form for evidence; not that he was unable to get it—he was able to *get* it, but was not able to *give* it. It is evident that, for him, the cost of procuring witnesses and presenting them or their depositions would be great at this distance. His plea of financial disability was a true one, and worthy of just consideration.

Inasmuch as it appears from his own statement that he preferred to allow the case to go against him by default rather than to go to the expense of furnishing witnesses to sustain it, your decision refusing to allow him to put the defendant to the expense of a rehearing was just and proper, and is hereby affirmed.

TIMBER CULTURE APPLICATION—PREFERENCE RIGHT.

WILLIAM F. PERKINS.

A successful timber culture contestant who files a timber culture application at the time of beginning of his suit, but fails to exercise his preference right within the statutory period, has thereafter no claim that is protected from the operation of the subsequent repeal of the timber culture law.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 20, 1893.

William F. Perkins has appealed from your decision of July 28, 1892, sustaining the action of the local officers in rejecting his application, presented on April 4, 1892, to make timber-culture entry of the SE. $\frac{1}{4}$ of Sec. 15, T. 28 S., R. 35 W., Garden City land district, Kansas.

The ground of rejection was that, prior to the date of said application, the timber-culture law had been repealed by the act of March 3, 1891 (26 Stat., 1095).

The appellant directs attention to the facts that he had previously contested the timber-culture entry of one John B. Wells for the same tract; that when he initiated contest he filed a timber culture application; that upon the cancellation of Wells' entry as the result of said contest on October 29, 1890, he (Perkins) was notified that thirty days were allowed him in which to make entry of the tract; but that he was prevented from so doing by his inability to procure the money with which to complete his entry.

Your decision states that the records of your office do not show that an application was filed by him at the time of initiating the contest; and holds, on the authority of the circular of August 18, 1887, and of the departmental decision in the case of *Smith v. Fitts* (13 L. D., 670), that when the contestant failed to exercise his preference right of entry within thirty days from notice of the cancellation, his application to enter "stood rejected without further action on the part of the local office."

The appellant directs attention to the fact that in the case cited, an entry (by Mrs. Fitts) had been allowed, after the expiration of thirty days but before Smith had applied to enter, while in the case at bar no adverse claim had attached to the land before Perkins applied to enter.

To this it may be answered that the right acquired by the application filed at the time of initiating contest was the preference right granted, for thirty days after notice of cancellation, by the second section of the act of May 14, 1880 (21 Stat., 140). After the expiration of thirty days he no longer had any right under that act—no preference right; although it may be acknowledged that he had the same right as any other person. But no other person would have had the right to make timber-culture entry of any tract after March 3, 1891. Therefore

as Perkins failed to exercise his preference right within the time allowed by law, and as he in common with all other persons could initiate no other right under the timber-culture law after its repeal, his application was properly rejected.

OKLAHOMA LANDS—SECOND HOMESTEAD ENTRY,

JAMES W. SHEARING.

The right to make homestead entry of Oklahoma lands, conferred by the thirteenth section of the act of March 2, 1889, upon persons who had previously made homestead entry and commuted the same, is extended by section 18, act of May 2, 1890, to lands acquired by cession from the Muscogee Indians.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 20, 1893.

James W. Shearing has appealed from your decision of August 23, 1892, rejecting his application to make homestead entry of the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 21, T. 8 N., R. 3 E., Oklahoma land district, Oklahoma Territory.

Your rejection was based upon the ground that he had previously made a homestead entry, in the Wa-Keeney land district, Kansas, which he had commuted to cash entry, and upon which patent had issued, May 24, 1889.

He bases his appeal upon the ground that the tract now applied for lies within that portion of the Territory of Oklahoma, known as the "Pottawattomie country," and that within those limits the right to make entry has been conferred upon persons who had previously made homestead entry and commuted the same.

This Department has held that the right to make homestead entry of Oklahoma lands, conferred by the thirteenth section of the act of March 2, 1889 (25 Stat., 1004, 1006), upon persons who had previously made homestead entry and commuted the same, is extended by section 18 of the act of May 2, 1890 (26 Stat., 81), to lands acquired by cession from the Muscogee (or Creek) Indians. (John Waner, 15 L. D., 356.) This ruling includes the lands here in controversy.

Your decision is therefore reversed; and if no other objection is found, Shearing's application will be allowed.

DESERT LAND CONTEST—PREFERENCE RIGHT.

WILLIAM G. BRUCE.

A pre-emptor who contests and secures the cancellation of a prior desert land entry, in conflict with his filing, and thereupon perfects his pre-emption claim, exhausts thereby his preferred right as a successful contestant.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 24, 1893.

On December 15, 1884, Ellis Johnson made desert-land entry for SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 10, and the NW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of Sec. 15, T. 32 N., R. 63 W., Cheyenne, Wyoming.

Some time in the early months of 1885 William G. Bruce made a pre-emption filing for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 15, same township and range, being a part of the land embraced in the entry of Johnson.

On June 16, 1885, he initiated a contest against Johnson's entry and prosecuted it successfully, so that because of said contest the entry was cancelled on January 4, 1889, by departmental judgment of that date. Said cancellation was noted on the records by direction of your letter of promulgation dated January 25, 1889. This left Bruce's filing intact, and on March 19, 1889, he entered the tract included therein, and has since received a patent therefor.

On October 13, 1887, Fred H. Redington made a timber-culture entry for the SW. $\frac{1}{4}$ of Sec. 15, same township and range. It will be noticed that while this tract is within the same section, it in no wise conflicts with either the desert-land entry of Johnson or the pre-emption entry of Bruce.

In March, 1889, Bruce applied to make a timber-culture entry for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 15, same township and range, alleging that he was entitled to a preference right to make this entry by reason of his successful contest against Johnson, and requesting that the timber-culture entry of Redington made in 1887 for other land in said section be cancelled, as under the law only one timber culture entry of 160 acres could exist on any one section. His application was not allowed, and on October 27, 1890, in rejecting it you held substantially that Bruce had used all the preference right allowed him by making the pre-emption entry after the cancellation of Johnson's entry.

He has appealed from your judgment, alleging that you erred in holding that his preference right was exhausted and states that "as the said pre-emption filing antedated the said contest . . . the offering of final proof was merely the perfection of a title to the land which originated with my first act of settlement. Thus the land belonged to me from that time."

Your judgment is correct. Bruce's pre-emption entry was made as a result of his contest, and he could not have been allowed to make it had his contest proved unsuccessful, for the entry of Johnson while on the records segregated the land from the public domain. It was not his settlement alone on the tract that gave him the right to enter it, for he could never have acquired a title to it had it not been for the fact that the entry covering it was cancelled. The result of his enterprise and the expenditure of his time and money in contesting and procuring the cancellation of the entry was that he was allowed to make an entry and get title to the land on which he lived, and he was entitled to no further preference right.

There were five hundred and twenty acres of land in the Johnson entry, and if Bruce, having made one entry of one hundred and sixty acres under the pre-emption law, may now be allowed, notwithstanding adverse claims, to take another one hundred and sixty acre tract under the timber-culture law, why may he not also be allowed to enter another one hundred and sixty acre tract under the homestead law, thus practically using three preference rights as a result of one contest. I am satisfied that his preference right was exhausted when he made his pre-emption entry. This entry must not be confounded with the filing, and this mixing of these terms has probably led the applicant in this case into the error he makes in contending that his filing was made before contest, and hence his right thereunder did not depend on the successful determination of the contest.

Your judgment is affirmed.

STONE LAND—PLACER CLAIM—HOMESTEAD.

FLORENCE D. DELANEY.

A placer location made prior to the act of August 4, 1892, of land chiefly valuable for a deposit of glass sand and building stone, is not a legal appropriation of the land, and a subsequent intervening homestead entry of another will defeat the right of the placer claimant to perfect his claim under said act.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 24, 1893.

I have considered the appeal of Florence D. Delaney from your judgment of October 19, 1891, rejecting his application for a patent and to make mineral entry of the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 26, T. 19 N., R. 70 W., Chyenne, Wyoming.

He applied to enter the tract as a placer mine, alleging that on January 19, 1889, he located the claim as placer ground, and that it contains a valuable deposit of glass sand and building stone.

The register and receiver rejected the claim, basing their rejection on the ruling of this Department in the case of *Conlin v. Kelley* (12 L. D., 1).

He appealed to you, and on October 19, 1891, after considering the case, you affirmed their finding.

He then appealed to the Department, and the case is now here for adjudication:

Since said appeal was taken the act of August 4, 1892, has been passed (27 Stat., 348), providing that land chiefly valuable for building stone may be entered under the placer laws. It was ruled, however, in the case of *Clark et al. v. Ervin* (16 L. D., 122) that—"It does not follow . . . that land chiefly valuable for building stone shall be considered as mineral land, or that such land may not also be entered under the homestead law."

From the report of the register and receiver, as well as from your judgment, it is learned that one Ann Davidson made a homestead entry of this land on November 7, 1889. The record of her claim is not before me, for it nowhere appears that she has been made a party in the case, and no notices of the appeals have been served on her. It follows that any judgment that might now be rendered against the validity of her entry would be without authority.

It was held in the case of *Clark et al. v. Ervin* (*supra*) that—

The tract was located as a placer claim on May 27, 1889, which was several months prior to the initiation of Ervin's pre-emption claim. It follows, I think, that if the placer location was a valid one, the claim of Ervin must be rejected. After a legal mineral location has been made, a claim may not be initiated for the same land under settlement laws, unless on proof furnished it is shown that the location is invalid, or that the ground is not mineral, or that no discovery has been made; in other words, the mineral claim must be disposed of before an entry can be made under the homestead law.

In this case I find that no law existed allowing land chiefly valuable for common building stone to be entered under the placer law prior to August 4, 1892. *Coulin v. Kelley* (12 L. D., 1).

Since the claim of Ervin was initiated before this act of August 4, 1892, *supra*, was passed, he is entitled to the land, if he has in good faith complied with the pre-emption law, because the placer location was illegal, the tract not being subject at that time to such location.

Delaney might properly make entry and secure a patent for this land, since the passage of the act of August 4, 1892, (*supra*), making such land subject to the disposal under the placer laws, but the claim and entry of Davidson asserted and made is a complete bar, if said entryman is qualified and has complied with the law. These questions can not, of course, be determined under the present application.

Your judgment must be and is hereby affirmed. See also case of *Joseph H. Harper et al.* (16 L. D., 110); *South Dakota v. Vermont Stone Company* (16 L. D., 263).

RAILROAD GRANT—CONFLICTING SETTLEMENT RIGHT.

MISSOURI, KANSAS AND TEXAS RY. CO. *v.* TROXEL.

Land included within a valid settlement claim is not subject to indemnity selection, and the failure of the settler to file his claim within the statutory period will not operate to defeat the effect of said claim as against the company, nor limit the extent of said claim to the particular tract on which the improvements are situated.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 26, 1893.

I have considered the case of the Missouri, Kansas and Texas Railway Company *v.* Charles L. Troxel on the appeal of the company from your decision of February 1, 1892, rejecting its indemnity selection of the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 34, T. 25 S., R. 20 E., made at the Topeka land office, in the State of Kansas, on September 25, 1882, under its grant by the act of Congress approved July 26, 1866 (14 Stat., 289).

The record shows that an executive withdrawal was made which became effective on April 3, 1867; that one David L. Adams filed his pre-emption declaratory statement for said tract on August 11, 1866, alleging settlement thereon the same day, and on September 25, 1882, said company selected said land as indemnity for loss of lands within the primary limits of its said grant; that said Troxel applied to enter said land on October 31, 1887, under the homestead law, and a hearing was duly had to determine the rights of the respective parties; that upon the testimony submitted, the local officers decided in favor of Troxel, and their judgment was affirmed by you, and the selection of the company was held for cancellation; that on appeal, this Department, on January 10, 1891 (unreported), held that said filing of Adams being *prima facie* valid, excepted said tract from said withdrawal, and

being unaffected by said withdrawal, it follows that when selected by the company the tract in question was subject to the settlement of Herring. As the company's right to the land must be determined by its status at the date of selection, *M., K. and T. Ry. Co. v. Beal (supra)*, it follows that if Herring was then qualified to make entry under the settlement laws, the selection in question is invalid, (and you were directed) that a hearing be duly had to determine the matter of Herring's said qualifications at the date of the company's selection, and upon the evidence adduced you will, in accordance with the views heretofore expressed, re-adjudicate the case.

The rehearing was duly had, and upon the testimony submitted the local officers decided in favor of the railroad company, citing as authority the rulings of the Department in *Central Pacific R. R. Co. v. Taylor et al.*, 11 L. D., 354; *Northern Pacific R. R. Co. v. Potter*, id., 531, 533; and same *v. Beck*, id., 584. The local officers ruled in effect that the homestead claimant must file the necessary affidavit and application to enter the land prior to the selection of the railroad, and that "his settlement alone, in the absence of such affirmative action, cannot establish a legal claim to said tract."

On appeal, you found from the evidence that said Frank Herring was born in Illinois and was a soldier in a regiment from that State during the late war; that he occupied said land with his family from 1878 until the spring of 1883, and then sold his improvements and possessory right to the whole quarter section to said Troxel, who has occupied and improved the same with the intention of making it his home under the homestead law, and that he never occupied any other land under the homestead or pre-emption law. You affirm the local officers in rejecting the two *ex parte* affidavits offered by said company and Troxel, relative to the occupancy of Herring, and hold that the land was occupied by a qualified entryman at the date of the company's selection, and hence was not subject thereto.

The company in its appeal insists that you erred in not considering said *ex parte* affidavits, and in holding that Herring was a qualified entryman on September 25, 1882, the date of its said selection.

In argument counsel for the company admits that the evidence shows that said Herring settled on the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ in the spring of 1879, and lived there until the spring of 1883, when he sold his improvements to said Troxel, but insists that the improvements were all situated on the W. $\frac{1}{2}$ of said quarter section, and that he made no claim to the E. $\frac{1}{2}$ of said quarter; that conceding that he occupied the whole quarter, he acquired no right thereto, because he did not apply to file for or enter the same until long after the three months from the date of his settlement, and having failed to protect his said settlement by filing or entry, the land became subject to the selection of the company, citing as authority the rulings of the Department in *Christensen v. Mathorn*, 7 L. D., 537; *Osmundsen v. McDonald*, 6 L. D., 391; *Watts v. Forsyth*, 5 L. D., 624, and 6 L. D., 306; *Walker v. Snider*, 4 L. D., 387. It is also insisted that the judgment of the district court of Allen county, Kansas, in the case of *C. H. Pratt, transferee v. said Troxel*, awarding said land to Pratt, is conclusive of the rights of said parties, and ought to be acquiesced in by this Department.

It is quite evident that the contention of the company cannot be sustained. The preponderance of the evidence warrants your conclusion that at the date of the company's said selection, Frank Herring was qualified to make entry of said land under the settlement laws. His failure to file his application for the land within three months does not operate as a forfeiture of his claim in favor of the railroad company. If he was a duly qualified settler and had improvements upon any part of said quarter section, claiming the whole quarter, at the date the company applied to select any part thereof, the land was not subject to its selection. That Herring did live upon said quarter with his family and claimed the whole quarter section from 1879 to 1883, was expressly ruled in said decision of the Department, and the hearing was ordered for the express purpose of determining "if Herring was then qualified to make entry under the settlement laws." It has been the ruling of

the Department for a long time that a valid settlement upon lands within the limits of a railroad grant at the date when the same takes effect excepts the land from the operation thereof.

In *Perkins v. Central Pacific R. R. Co.*, 1 L. D., 336, 341, it was said—"It was, I think, the intention of Congress that only such unoccupied lands as were not held under any claim recognized by the government should pass under the grant."

In the case of *Hudson v. Central Pacific R. R. Co.*, 15 L. D., 112, it was held that—

The possession and occupancy of a qualified settler, existing at the date of definite location, except the land covered thereby from the operation of a railroad grant, even though the settler at such time is not asserting any claim under the public land laws.

See also *Southern Pacific R. R. Co. v. Brown*, 9 L. D., 173; *Northern Pacific R. R. Co. v. Kerry*, 10 L. D., 290; *Northern Pacific R. R. Co. v. Potter*, 11 L. D., 531.

The same rule applies to lands within the indemnity limits covered by valid settlements at the date of the railroad selections. *Elwell v. Northern Pacific R. R. Co.*, 5 L. D., 566; *Northern Pacific R. R. Co. v. Waldon*, 7 L. D., 182; *Lane v. Southern Pacific R. R. Co.*, 10 L. D., 454.

The authorities cited by the learned counsel for the company arose between settlers claiming priority of right under the act of May 14, 1850 (21 Stat., 140), and are not applicable to cases between settlement claimants and railroad companies claiming under grants by acts of Congress. If a valid settlement exists at the date of the selection, the land included therein is not subject to such selection, and it does not concern the company whether the applicant has filed within the time required by law or not, for it does not occupy the position of "purchaser" or settler. *Emerson v. Central Pacific R. R. Co.*, 3 L. D., 271; *Schetka v. Northern Pacific R. R. Co.*, 5 L. D., 473; *Chicago, St. Paul, Minneapolis and Omaha Ry. Co.*, 9 L. D., 221; *Central Pacific R. R. Co. v. Taylor*, 11 L. D., 445.

There was no error in not recognizing the judgment of said court as conclusive upon this Department as to the title of said land. No patent has been issued, and this Department is a special tribunal duly authorized to determine which of said parties, if either, has the prior right to the land in question.

In *Shepley v. Cowan*, 91 U. S., 330, 340, the supreme court say—

The officers of the land department are specially designated by law to receive, consider and pass upon proofs presented with respect to settlement upon the public lands, with a view to secure rights of pre-emption. If they err in the construction of the law applicable to any case, or if fraud is practiced upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts when a controversy arises between private parties founded upon their decisions.

A careful examination of the whole record shows no error in your decision, and it is therefore affirmed.

RES JUDICATA—HEARING—CONFIRMATION.

SANTA CRUZ ET AL. v. HAYDEN.

The Commissioner of the General Land Office has no authority to re-open a case in which the judgment of his predecessor has become final; the Department only has jurisdiction to act in such a case.

A hearing should not be ordered on an uncorroborated affidavit of contest in which no specific charge is made against the entry in question.

The pendency of an application to contest an entry will not defeat its confirmation under the proviso to section 7, act of March 3, 1891, where such application must be rejected on account of prior proceedings by the government, though said proceedings were begun too late to prevent confirmation.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 26, 1893.

On June 9, 1877, Sallie David Hayden made desert land entry No. 47 for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 24, T. 1 N., R. 4 E., Tucson, Arizona. She made proof of reclamation, paid for the land, and received a final certificate and receipt on February 16, 1880.

On February 18, 1878, Cypriano Santa Cruz filed a pre-emption declaratory statement for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section 24, alleging settlement January 9, 1878. On January 12, 1880, which was before final desert land entry was made by Hayden, he changed his filing and made homestead entry, and on July 3, 1886, submitted final proof and received a final certificate of entry.

On March 9, 1880, the register and receiver forwarded to you the sworn statement of C. Santa Cruz, showing that he had as a matter of fact settled on the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of section 24 in 1875, two years before Mrs. Hayden's entry was made, and that he had irrigated said land and raised good crops thereon before Mrs. Hayden gave notice that she would reclaim the land. In short, that the tract was thoroughly reclaimed before her entry was made. This affidavit was corroborated by Trinidad Palmer, and a formal application was made for a hearing. This application was endorsed on the back thereof as being the application of Cypriano Santa Cruz and Trinidad Santa Cruz for a hearing in the matter of the final proof of Sallie D. Hayden, desert entry No. 47.

In his corroborating affidavit, after stating facts in reference to the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 24 claimed by C. Santa Cruz, Palmer concluded by saying—

That four years ago when he first knew the part claimed by Trinidad Santa Cruz that said land had been cultivated and crops raised thereon; that ditches for watering the same had been made and the land made to produce crops, had been cleared of the brush and mesquite, and a house built thereon, which was occupied.

The following is a copy of the application for a hearing made for Trinidad Santa Cruz:

To the Register U. S. Land Office, and through him to the Hon Commissioner U. S. Land Office, Washington, D. C.

Please find enclosed and attached hereto, evidence which the contestant respectfully submits shows that the location of the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$ section 24, township 1 north of range 4 east of the lands subject to entry at Florence, Arizona, by Sallie D. Hayden, is unjust and not valid.

1st. Because the said lands were reclaimed and made to produce crops more than two years prior to the location of the said Hayden.

2. The said Hayden is a married woman and as such is not entitled to locate desert land.

All of which is respectfully submitted, and contestant prays to have a full hearing before the land officers at Florence.

TRINIDAD SANTA CRUZ,

By his attorney, WILLIAM WILKES.

On June 21, 1880, you ordered a hearing as to the charges made by C. Santa Cruz against the entry, and the trial was had before the receiver of the local office, who decided that contestant had proven his charges, and he therefore recommended Mrs. Hayden's entry for cancellation as to the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 24. The register of the land office at that time had been suspended by order of the President, and took no part in the case.

October 23, 1880, you sustained the finding of the receiver, and Mrs. Hayden was notified of your judgment on April 15, 1883, and took no appeal therefrom. Her entry was canceled on May 22, 1883, as to the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section 24.

On application of Curtis and Burdette on behalf of Mrs. Hayden asking to re-open the case, you refused to do so on September 20, 1884.

On February 3, 1887, you required supplemental proof by Mrs. Hayden as to the remaining part of her entry. Such proof was transmitted to you on June 8, 1888, and also an application on behalf of Charles K. Crosby to contest her entry as to the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 24, alleging substantially that the entry was illegal, because made on land already reclaimed, etc.

July 27, 1888, Hon. M. C. Smith, M. C., asked for a statement of the status of her entry, and filed a letter of C. T. Hayden, her husband, dated June 8, 1888, stating the facts in the case as he understood them.

On August 15, 1888, treating these letters as an application to re-open the case of C. Santa Cruz v. Mrs. Hayden, you directed the register and receiver to call on Santa Cruz to show cause within thirty days why all the proceedings in his case against Mrs. Hayden should not be vacated and set aside, holding that the hearing was had without jurisdiction, because of the absence of the register. The call was made on January 22, 1889, and on February 10, following, Santa Cruz filed an appeal from your order of August 15, 1888.

You refused to transmit the appeal, holding that the order was an interlocutory one from which he was not entitled to appeal.

He applied here for a writ of certiorari, but his application was denied on October 25, 1890, because not accompanied by a copy of the decision complained of.

November 7, 1890, you directed the register and receiver to proceed as ordered by your letter of August 15, 1888.

On August 28, 1891, you reconsidered the decision made directing Santa Cruz to show cause, etc., and held that the case of C. Santa Cruz *v.* Mrs. Hayden was closed. You also directed a hearing on the application of Trinidad Santa Cruz to contest said entry as to the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 24, made in 1880, but overlooked in your office until 1891. In your last named judgment it was stated

As I am satisfied that a hearing would elicit nothing new, on the real question at issue; and as the same would add to the long period of delay through which this case has already dragged, no hearing will be ordered.

That Mrs. Hayden may have all the relief, possible in the premises, I shall make a decision from which she may appeal, if she so elects.

It is: That the order of cancellation as to the N. $\frac{1}{2}$ NE. $\frac{1}{4}$, of Sec. 24, of her desert land entry No. 5, as above described, shall stand, because besides the testimony taken at the hearing had, her own admissions, as well as those made in her own behalf, as shown above, shows the illegality of her entry.

And now a word as to Trinidad Santa Cruz's claim to the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ of said Sec. 24, and his application for a hearing, as above stated.

You will advise Chas. K. Crosby, hereof, and that his amended application (as transmitted by your letter of May 20, 1889), will be filed to await the conclusion of the pending matter.

You will also set a date for the hearing on Trinidad Santa Cruz's application—"alleging prior settlement and cultivation" by said Trinidad Santa Cruz, issue notice to him, or his attorney (if he has one) for service on the defendant, and in due time report action thereon.

You are charged to avoid any unnecessary delay, (observable in the proceedings above mentioned) in the premises, and to report promptly as occasion arises.

Mrs. Hayden has appealed from your judgment to the Department, and the case has been duly considered. It is contended on behalf of contestee that her entry should be held confirmed under and by virtue of the seventh section of the act approved March 3, 1891 (26 Stat., 1095), and it is also contended on behalf of C. Santa Cruz that his entry should be held confirmed under the same law.

As to the case of C. Santa Cruz *v.* Mrs. Hayden, I am of the opinion that your judgment of August 28, 1891, is correct.

Conceding the irregularity and possible want of authority in the original proceeding which resulted in the cancellation by your office of the entry as to the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section, yet the judgment of cancellation became final in your office in 1883, and could not be re-opened by a subsequent Commissioner. Moreover, the desert land claimant acquiesced therein, having taken no appeal, and should at this late day be held estopped from claiming the land or having the case re-opened, especially in the face of an adverse claim which has been of record since 1880. An additional evidence of the acquiescence in the judgment of cancellation in 1883 is the fact that the claimant applied for repayment of the purchase money paid on the desert land entry.

Only the Department has the jurisdiction to re-open a case like this,

and in view of the facts above recited, it will refuse to take such action, and will treat the case as finally closed.

Your judgment is therefore affirmed in so far as it holds to be final the cancellation of Mrs. Hayden's entry as to the last above described land.

I do not think, however, that a hearing should be ordered on the application of Trinidad Santa Cruz. He has made no specific charges against the entry, but is asking for a hearing on the single sworn allegation of Palmer, C. Santa Cruz's corroborating witness, who says in substance that the land was reclaimed before Mrs. Hayden made her entry, but who does not particularly describe what was done on the land. His statement is entirely without corroboration, and it is for this reason probably that no action has been taken on it during all the years since it was filed.

An affidavit of contest should contain a fair statement showing the invalidity of an entry, and should be properly corroborated, in order to show the good faith of the contestant, especially where it is proposed, as in this case, to proceed with a contest informally and irregularly initiated, more than thirteen years ago, a still longer time having elapsed since said entry was consummated, the money paid for the land and final certificate issued.

Your judgment, in so far as it directed the local officers to order a hearing on the application of Trinidad Santa Cruz made in 1880, is reversed, and said application is rejected.

The proviso to the seventh section of the act of March 3, 1891 (*supra*), provides:

That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

The desert land entry of Mrs. Hayden was made and final receipt issued in 1880. The government initiated no proceedings against it until 1887, when supplemental proof was called for and furnished. It follows that unless there was at the date of the passage of the act of March 3, 1891, a pending contest or protest on behalf of an individual under the rules of practice against the validity of the entry, Mrs. Hayden is entitled to a patent on her entry as it stands, for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 24.

Was there such proceeding pending? I think not. It is true the Department has held in the Paulson *v.* Owen case (15 L. D., 114), that (syllabus) "a pending valid application to contest an entry defeats the confirmation of said entry under the proviso to section 7, act of March 3, 1891," and prior to the approval of said act, Charles K. Crosby had filed his application to contest said entry; still the government, by its

action of February 3, 1887, in calling on Mrs. Hayden to submit "supplemental proof to show the complete irrigation of the land remaining, viz.: the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$," assumed the investigation of the validity of her entry, and the application of Crosby thereafter to contest on practically the same grounds upon which the government had begun its investigation, should be rejected. It never has been accepted by the government, and in view of the investigation already begun, and the great length of time that has elapsed since the entry in question is made, and the fact that Mrs. Hayden is shown to have made valuable improvements on the land, I am of the opinion that the Department is not bound to allow said Crosby to further proceed.

Mrs. Hayden has made a showing, as directed by you in 1887, but I do not now deem it necessary to pass upon its sufficiency, since your order of 1887 was not made within two years from the date of the entry. Said entry was confirmed by the proviso to section seven, and Mrs. Hayden is entitled to a patent for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 24, T. 1 N., R. 4 E.

In conclusion I would state that your judgment of August 28, 1891, is affirmed in so far as it holds that Mrs. Hayden's entry is finally canceled for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said Sec. 24; otherwise it is reversed. You will reject the applications of Trinidad Santa Cruz and Charles K. Crosby to contest Hayden's remaining entry for the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 24, T. 1 N., R. 4 E., and issue a patent to her for said tract.

PRE-EMPTION CONTEST—ENCLOSURE—GOOD FAITH.

HERINGTON v. CAMPBELL.

The fact that a part of the land, including all the improvements of the claimant, is within the enclosure of another person, does not necessarily impeach the good faith of the pre-emptor.

A judgment of cancellation is not warranted on contest proceedings in the absence of affirmative testimony in support of the charges against the entry.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 26, 1893.

The land involved in this appeal is the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 6, T. 27 S., R. 26 E., M. D. M., Visalia, California, land office.

The record shows that James F. Campbell filed pre-emption declaratory statement for said tract July 11, 1888, alleging settlement July 4, preceding. On March 8, 1889, he made final proof and entry. By your letter of August 12, 1889, a hearing was ordered on the application to contest of James Herington. In his affidavit filed April 29, 1889, he alleged that he was well acquainted with the land, for six months residing within three fourths of a mile of the same; that he had been over it two or three times a week during that time and lives

within plain sight of it; that he had never seen Campbell on or about it but twice during the six months; that he had never seen a light or fire in the house or any indication of any one living there; that he had almost daily seen claimant at Poso station, and alleges on information and belief that claimant has slept, boarded and lived there; that one-half of said land, including the improvements, is within the enclosure of Carr and Haggin's stock-range; that their stock range and graze over said land and destroyed claimant's crops. He charges on information and belief that the improvements were placed on the land by Carr and Haggin, the cultivation done by them and the entry made in their interest.

All the testimony, except the deposition of one witness, was taken before the local officers, who decided that the allegations were not sustained and recommended that the contest be dismissed. Herington appealed, and you by letter of April 6, 1892, reversed their judgment, whereupon Campbell prosecutes this appeal, assigning as error substantially, that your judgment is against the evidence, which it is claimed is of a negative character on the part of the contestant.

I am disposed to think the grounds of error are well taken. The allegations in the affidavit of contest, may be stated as follows:

- 1st. Failure to reside upon the land;
- 2nd. That a part of the land, including all the improvements of claimant is within the inclosure of Carr and Haggin;
- 3d. That the improvements were put upon the land by Carr and Haggin and that the entry was made in their behalf; this is alleged to be on information and belief.

The first allegation as stated above is purely of a negative character. The contestant does not state affirmatively that the claimant did not reside upon the land, but says that for six months he did not see him there but a few times, and saw no evidences of a residence thereon. Granting, this to be true, I hardly think the statement sufficient to cancel the entry. But the evidence in support of this allegation is of exactly the same negative character.

The first witness, Brown, lived a little over a quarter of a mile from claimant's house. He never was in the house. His means of observation were from the county road about two hundred yards, and from the railroad, about one hundred and fifty yards from the house. He frequently passed the house at these distances "during the day, evening and night time." He did not see Campbell there more than three or four times, and saw a light there but one evening. He says the house was in plain view and he could see claimant's chickens in the yard. On cross examination one question and answer utterly destroys even the negative character of this testimony. It is:

Q. Do you know whether or not Campbell lived upon that land between July 4, 1888, and March 8, 1889?

A. I can not state. I was never inside his house. I don't know if he lived there or not.

Herington's testimony on this point is of no more convincing character. He simply says that he never saw Campbell from September 23, 1888, to March 8, 1889, upon the land, either day or night; never saw a light or fire in the house, or smoke therefrom. His residence during this period was on the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 8, three-fourths of a mile from claimant's. He traveled to and fro on the county and railroad during this time. The witness Gallagher was at the house September 23, 1888, and he saw it several times in the next two months, and he says he saw "nothing to indicate that there was" any one living upon this land. This is all he says on this point.

Now this is all the testimony that was offered by contestant as to his residence on the land, except that the two latter witnesses state that from their observation there was nothing in the house to indicate a residence prior to September 23, 1888, and some statements alleged to have been made by Campbell in another case as to where he boarded, which will be adverted to hereafter. I am strongly impressed with the opinion that this testimony is insufficient to contradict the positive statement in the final proof, or to sustain a proper allegation of non-residence.

The second charge is probably based on question No. 12, and the answer thereto in the final proof, wherein the question is asked if the land is within any "fence or other inclosure." The answer is that it is not. The testimony shows that in this vicinity there are about one hundred thousand acres of land inclosed in a fence, constructed by Carr and Haggin and the Southern Pacific Railroad company, and that about one-half of the land in controversy, including the improvements, is within this inclosure. The particular line of fence, however, that runs across this land, is shown to belong to the railroad company. That is, I conclude this to be so from the testimony of Campbell, who swears positively that it does, and gives his means of knowledge, while the contestant's testimony is purely hearsay. It is shown that within this immense inclosure that there are other entries of government land. So I think the conclusion may be safely indulged in that this fence is built and maintained either in defiance of the law or with the consent of the settlers, and in either event I do not think this fact of itself should defeat an entry otherwise made in good faith. An unlawful fence inclosing public land would certainly be no bar to an entryman in making his final proof. Moreover, Campbell says in his testimony that in answer to the question he detailed the facts as to this fence to the receiver when he made his final proof and the answer, as it appears, was written by that officer. Manifestly, then there was no intention on the part of the claimant to practice deceit in making this statement.

In support of the third charge it is shown that the claimant was in the employ of Carr and Haggin; that the lumber to build his house came from their lumber yard; that the carpenters who built it were in

their employ and that the teams that plowed the ground belonged to them.

Campbell's statement concerning his entry is substantially as follows: He is superintendent of Carr and Haggin's warehouse at Poso and is postmaster of Spottiswood. His business is about one-half a mile from the land. He purchased a relinquishment of this land paying therefor \$800, which he borrowed from Mr. Carr a member of the firm. This loan had been provided him some months before for the purpose of enabling him to take a piece of land for himself, and while employed by them at another place. The lumber in his house he selected from their lumber yard and charged the same to himself; he got their carpenters to build the house and their teams to do his plowing, and charged both items to himself on the books. He says that Carr and Haggin have no interest whatever in his land nor any one else. He resided on the land continuously from July 11, 1888, to March 8, 1889, sleeping there nights, but most of his meals were taken at the warehouse. He prepared his house about September 23, 1888, so that he could live in it during the winter season and provided it with cooking utensils. He is a single man and says he found his cooking was a failure. His improvements are a dwelling house; chicken house; bored well; buggy-house and stable and bath house, of the total value of \$490, and twenty five acres of breaking.

These statements are uncontradicted by any evidence, and any circumstances that might be construed to show fraud and collusion, and thus break the force of his positive testimony are insufficient in my opinion for that purpose.

The opinion of the local officers who heard the testimony, saw the witnesses and perhaps knew them, is entitled to great weight in this case. The cross-examination of the contestant tends very largely to break the force of his statements. His testimony is almost entirely hearsay and therefore incompetent as well as being of a negative character. And the same may be said with nearly equal force of the other witnesses.

In my judgment the charges of the affidavit of contest are not sustained.

Your judgment is therefore reversed.

PRACTICE—HEARING—NOTICE—CONTINUANCE—EVIDENCE.

AUSTIN v. DE GROAT.

A contestant is entitled to notice of the Commissioner's action when a hearing is ordered upon an application to contest a final entry.

An order of continuance should be granted on the application of a contestant where it appears that he has not received due notice of the day fixed for hearing, that he is unable to appear on said day on account of sickness, and that witnesses as to material facts are absent through no fault of the contestant.

When testimony is taken in shorthand the stenographer's notes should be written out and then subscribed by the witness.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 26, 1893.

I have considered the case of Winfield S. Austin v. Grant C. De Groat, on the appeal of the former from your decision of July 25, 1892, dismissing his contest against the timber land cash entry No. 3551 of the SE. $\frac{1}{4}$ of Sec. 24, T. 14 N., R. 9 W., made on October 22, 1889, by said De Groat, at the Vancouver land office, in the State of Washington.

The record shows that said Austin, on March 26, 1890, filed his affidavit of contest against said entry, alleging upon information and belief that

he knows the present condition of the same; that said land is not unfit for cultivation, nor is it chiefly valuable for timber; that said entry was made in violation of the timber and stone land act, approved June 3, 1878, and in fraud of the public land laws.

Said affidavit was corroborated by three witnesses, who swear that they are acquainted with said tract and with other lands in the county, and "have carefully examined the tract above described; that said tract is comparatively level, and the soil is of good quality, capable of producing crops successfully by ordinary farming processes; that said tract is not subject to entry under the timber land act of June 3, 1878;" and they "believe that said tract could only be proved upon as timber land through the gross ignorance or collusion of claimant and witnesses, or both."

On June 4, 1890, you ordered a hearing on said allegations of contest, and notice was issued by the receiver to "James A. Munday, attorney in fact for Winfield S. Austin," that said hearing would take place before the local officers of "the 22nd day of September, 1890, at 10 a. m." The record fails to show notice to the claimant, but he and said attorney in fact appeared before the local officers on September 15, 1890, when the taking of testimony in the case was begun.

Prior, however to the examination of the witnesses, said Munday, on behalf of the contestant, moved for a continuance of the case, and in support thereof, filed his own affidavit, alleging—

that said W. S. Austin is lying seriously ill at Battle Creek, Michigan, and for that reason can not attend at the Land Office; that said Austin has not been legally

notified or informed of the time of hearing, in accordance with the rules of practice; that Frank Austin and other witnesses invited by him to examine the land in controversy, but whose names are unknown to affiant, are absent without the procurement of said W. S. Austin or of this affiant, or any one for said W. S. Austin; that said Frank Austin resides at Vancouver, Washington, and the residence of the other witnesses are unknown to this affiant; that said Frank Austin and other witnesses would, if present, testify that said tract is not chiefly valuable for timber; that there is not less than forty acres of bottom land, but more on said tract well fitted for cultivation, in fact, nearly all; that the timber is thin and scattering and of no commercial value, there not being sufficient quantity to pay for taking it out; that said evidence is material; that W. S. Austin has exercised the utmost diligence possible so far as this affiant knows and believes, being, in fact, disabled for any exertion, and bedridden; that this affiant on his behalf has exercised all the diligence possible to procure the attendance of said witnesses; that affiant believes the attendance of all absent witnesses can be (had) on the 25th day of October, 1890; that said date would give time for serving notices on all transferees who have not had legal notice of said hearing on this day; that he is informed and believes there are many of said transferees appearing of record; that affiant has made due effort to procure the names of said transferees, but can not now produce them on account of the absence of Frank Austin, who ascertained the same, or was instructed to ascertain the same; that this affidavit is not made for any mere purpose of delay, but to secure the production of proper testimony on behalf of contestant, and due notice to necessary parties hereto; that the engagement of this affiant as attorney was verbally made, and he therefore is now unable to produce written authority for appearing for contestant at any time, except when he is before the land office on legal notice as he is not now, and that this affiant has not been authorized to waive notice.

The register denied the motion for continuance, on the ground that it "does not state the names and residences of the witnesses (except one), and does not show that he has used any diligence in procuring their attendance." The claimant was then allowed to introduce his witnesses, and after he had examined two, counsel for contestant, having been absent, returned and cross-examined them under protest, insisting that it was irregular and illegal to require contestant to cross-examine said witnesses before he presented his own evidence; that he could not proceed in the absence of his witnesses. The register overruled the protest of counsel for contestant, on the ground that the surveyor who made the examination and at least two of the witnesses were present. Counsel for contestant then proceeded with the cross-examination under protest.

After claimant had examined nine witnesses, T. C. Calhoun, a transferee of a part of the land appeared in person, represented by counsel, and waived any informality of notice to him. At the same time claimant moved that the contestant be required to proceed with the examination of his witnesses who were present. This motion was resisted by counsel for contestant, on the ground that claimant having begun the examination of witnesses, he should finish before the contestant should begin; and for the additional reason that all of contestant's witnesses were not present. Claimant's motion was allowed, and counsel for contestant proceeded under protest to introduce his witnesses (record p. 117).

It also appears that testimony was taken by a shorthand reporter and a part of it was not in the presence of the local officers; that although the witnesses signed the stenographic notes, they did not sign their testimony after the notes had been transcribed, except said De Groat, as required by rule of practice number 42.

The local officers rendered separate opinions in the case. The register states that said hearing was set for September 22, 1890, but the evidence was submitted on September 15 to the 24th of September, said year; that the testimony was taken in shorthand, but said rule of practice was not complied with; that parties were notified that if they would enter into stipulation that the evidence might be considered, the local officers would raise no objection, but no such stipulation was filed; that said omission to comply with said rule of practice was a serious defect, as it did not appear that the stenographer was sworn to reduce the testimony to long hand in words and figures as given by the witnesses, but as counsel were notified of the omission and have filed arguments in the case and asked judgment on the record, the case ought to be considered as presented, without further delay. The suggestion is also made that said omission and the discrepancy as to date of hearing were, doubtless, due to the illness of the register preventing him from properly supervising the proceedings.

The register further held that the burden of proof was upon the contestant to prove his allegations in said contest; that the evidence failed to show that the final proof was made through "gross ignorance or collusion of claimant and witnesses, or both," but that it is shown that the land is not chiefly valuable for its timber, and is fit for cultivation by ordinary methods of farming; that the allegations in brief of counsel for claimant relative to the action in office of contestant can not be properly considered by the local land officers, because the government being a party in interest in every contest, good faith must be the basis of every application for entry of public land, and the good faith of the entryman is the decisive question at issue in the present case; that it appears, on account of the proximity of said tract to the town of South Bend, it has become too valuable for ordinary homestead purposes, having been sold for \$24,000, and this prospective value must have been known to the contestant, and explains his action in bringing said contest, which must be held to be speculative, and his application for a preference right of entry of said land, when restored, was made in bad faith. He recommended the cancellation of said entry.

The receiver found that said rule of practice had not been complied with, but the testimony should be considered by the local officers; that the evidence shows that said contest was speculative, but the evidence failed to prove the allegations of contest; that said entry was made in good faith, the land being subject thereto under the timber land act, and said entry ought to remain intact and said contest dismissed. On May 21, 1891, claimant appealed from the decision of the register, and

a motion for review and rehearing was filed on June 15, 1891, by counsel for contestant, alleging error on the part of both officers in holding that said contest was speculative, and error on the part of the receiver in finding that the entry was made in good faith and should be sustained. In support of said motion was filed the affidavit of contestant, alleging that when said testimony was taken he was sick and had been confined to his room in a distant State by serious illness, which prevented him from either attending the hearing or fully preparing for trial; that some of his witnesses were necessarily absent from said hearing on account of missing connections over the transportation lines upon which they traveled; that he was prejudiced by the manner in which said testimony was taken, being contrary to the rules of practice, and in the face of the protest of his attorney; that the evidence fails to show that said contest is speculative, and before such finding is made, the contestant should have an opportunity to offer evidence in rebuttal of the charge. Said motion was overruled, and the contestant appealed, alleging substantially the same errors contained in said affidavit filed in support of motion for review.

On appeal you held that the objection of the claimant that the land department had no jurisdiction to inquire into the validity of an entry after issuance of final certificate was not well taken, citing as authority *United States v. Montgomery* (11 L. D., 484); that there was no error in overruling the motion for continuance; and "the fact that contestant was not able to be present at the hearing in person is not sufficient ground for continuance; that the notice served upon contestant's attorney was sufficient, and "a statement what unknown witnesses would testify to is no cause for a continuance." You further find that the manner of taking said testimony was "singular;" that the testimony was not taken as required by the rules of practice, "yet both parties acquiesced in said irregularities, and in their briefs asked for judgment upon the evidence introduced in the hearing, as shown by the record;" that it is not contended that the record, which contains nearly four hundred typewritten pages, is inaccurate; that both sides seem to have had a full hearing before the local officers, and the circumstances do not require that the record be sent back for the signatures of the witnesses; but you direct that hereafter said rule 42 must be observed by the local officers.

You further find that said Calhoun was the only transferee of record, and there is no rule of practice requiring defendants not served with notice to voluntarily appear in a case.

Upon a review of the testimony you find that at the date of entry said tract was chiefly valuable for its timber, and had no value for agricultural purposes; that, if the timber were removed, the land could not be cultivated at a profit; that claimant has acted in good faith; and you accordingly sustain the entry and dismiss the contest.

In his appeal, counsel for contestant alleges twenty-three specifica-

tions of error, which may be summarized as follows: (1) In ruling that the local officers did not err in refusing said motion for continuance, and allowing the testimony to be taken contrary to the rules and regulations of the Department. (2) In holding that the local officers did not err in finding that said contest was speculative. (3) In holding that the land was subject to entry under the timber land law, and that the claimant had acted in good faith.

The oral arguments made in this case on April 14, 1893, and the elaborate briefs filed by the counsel in the case have received careful and patient consideration.

The record shows many irregularities in the proceedings, which ought not to have been allowed.

The act of Congress approved June 3, 1878 (20 Stat., 89), under which said entry was made, provides in section one that surveyed public lands within the limits of said State, with others, "valuable chiefly for timber, but unfit for cultivation," may be sold to certain persons therein named in quantities not exceeding 160 acres each, at two dollars and fifty cents per acre. The second section of said act requires the applicant to file a statement in duplicate under oath, designating the particular tracts desired, and

setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself.

The third section of said act prescribes the requirements as to publication of notice and the manner of making final proof and payment for the land.

It appears that the complainant complied with the requirements of said act and entered said land on October 22, 1889.

By section two of the act of May 14, 1880 (21 Stat., 140), a preference right of entry is given to every person who "has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry." Under the rules of practice (No. 5), it is declared that—"In case of an entry or location, on which final certificate has been issued, the hearing will be ordered only by direction of the Commissioner of the General Land Office." It is clear that under this rule the contestant is entitled to notice of your action when a hearing is ordered upon his application to contest a final entry. The burden of proof is upon him to show that the allegations of his contest are true, and he is required to pay the costs of the contest (Rule of Practice 54). It is therefore eminently right and proper that the contestant

should have due notice of the hearing, in order that he may make ample preparation for the successful prosecution of his contest.

It is true that under rule of practice No. 20, "a postponement of a hearing to a day to be fixed by the register and receiver may be allowed on the day of trial on account of the absence of material witnesses, when the party asking for the continuance makes an affidavit before the register and receiver showing" (1) that one or more of the witnesses in his behalf is absent without his procurement or consent; (2) the name and residence of each witness; (3) the facts to which they would testify; (4) the materiality of the evidence; (5) the exercise of proper diligence to procure the attendance of the absent witnesses; and (6) that affiant believes said witnesses can be had at the time to which it is sought to have the trial postponed.

While it appears that said rule does not specifically designate the absence of a party on account of sickness as a ground of continuance, yet where it is shown, as in the case at bar, that the contestant had not been duly notified of said hearing, and the affidavit is made by an attorney who swears that he has only been employed verbally, that the contestant has not been legally notified and he is not authorized to waive due notice of said hearing, and that the contestant is unable to be present on account of serious illness in the State of Michigan, and gives the name of one witness, stating that there are others unknown to him, together with what witnesses will testify to, which appears to be material; the allegations are sufficient, and the motion for continuance should have been granted. *United States v. Conners et al.* (5 L. D., 647); see note to *Stevenson v. Sherwood* (22 Ill. 238); 74 American Decisions, 141.

It also appears that the testimony was not taken as required by rule of practice No. 42; that no waiver of the requirement of said rule was made by counsel for contestant, but in his affidavit in support of his motion for review and rehearing in said case, contestant strenuously insisted that said testimony was not properly taken, and he also alleges the same error in his appeal from the opinions of the local office and your decision.

In my judgment the motion for review and rehearing should have been granted by the local officers, and on appeal, by your office. This view of the case obviates the necessity of passing upon the evidence in the case. It has, however, been carefully reviewed, but on account of the manner in which the testimony was taken, the conflicting opinions of the local officers upon the character of the land, the almost irreconcilable statements of the witnesses who were examined, the absence from the hearing of the contestant, who was shown to have been seriously ill, the value of the land, and the interest of the transferees, I think a rehearing should be had, at which all parties in interest may be present and offer testimony in accordance with the rules and regulations of the Department.

Your decision is accordingly modified, and you will direct the local officers to fix a time for a hearing of said case, and cause the parties in interest to be duly notified thereof, at which testimony may be submitted by the contestant tending to show the illegality of said entry, and by the claimant and transferees, in support of the same.

In view of the allegations of bad faith on the part of the claimant, that said contest is speculative, and since the government is a party in interest in every contest, the local officers should endeavor to ascertain whether said parties have acted in good faith, and make report upon the evidence submitted at said hearing. Upon receipt of the report of the local officers, you will readjudicate the case.

PRACTICE—RULE 97—APPEAL—NOTICE.

DOBER v. CAMPBELL ET AL.

In computing the time within which an appeal must be filed, where notice of the decision is served on the resident attorney, the day of mailing the decision and one day additional should be excluded.

Notice of a decision to an attorney of record is notice to the party he represents.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 13, 1893.

In the case of Alois Dober v. Mary L. Campbell and Samuel L. Selden, the contestant has filed a motion to dismiss the appeal, upon the ground that it was not filed within the time prescribed by the rules of practice.

It appears that your decision was rendered on December 20, 1892, and that on the same day Messrs. Britton and Gray of this city, were notified of said decision, as attorneys for the defendants. Excluding the day of mailing and the one day allowed by the rules, the time within which said appeal was required to be filed, under the rules, commenced to run on December 22, 1892, and expired February 20, 1893—provided the notice to said attorneys was notice to said defendants. The appeal was not filed in the General Land Office until March 9, 1893.

It is alleged in answer to said motion to dismiss that a similar notice was also served on F. O. Clark, attorney for said defendants, which was sent through the local office; and he filed an appeal from said decision, in behalf of said defendants, within the time required by the rules. Messrs. Britton and Gray insist that, while they "had generally represented these" (and other) "cash entrymen, *as a body*, before Congress and the Department for a series of years," as "the conflicts developed under this final legislation between such entrymen and alleged settlers involved in part certain *general* questions of law arising under the forfeiture act," yet they "were *not* the attorneys of Campbell and Selden, nor authorized to file appeal on their behalf;" and they

contend that therefore notice to them should not bind Campbell and Selden—whose appeal was filed in time by their local counsel.

In reply to said answer, counsel for the contestants allege that Messrs. Britton and Gray appeared for said defendants specifically—the argument filed in your office, and the copy of the same served upon counsel for contestants, being signed by them as “Attorneys for Mary L. Campbell and Samuel L. Selden;” and that when counsel for contestants served a copy of their argument on Messrs. Britton and Gray, the latter acknowledged such service as attorneys for the defendants named.

Said parties having appeared as counsel of record for Campbell and Selden, notice was properly given to them as such counsel; and the appeal not having been filed within sixty days from notice to said counsel, it must be, and is hereby, dismissed.

REPAYMENT—ASSIGNEE—RELEASE.

JAMES B. GOODMAN.

An entryman who applies for repayment, and alleges that he has sold the land covered by the canceled entry, that the sale was made under warranty deed, and that the warranty has been made good, should furnish evidence that he has in fact made good his warranty, and also obtain a release from his grantee of all interest under the entry involved.

*Acting Secretary Sims to the Commissioner of the General Land Office,
July 27, 1893.*

Under date of June 10, 1893, the First Comptroller of the Treasury returned to this Department report No. 57,148, with accompanying papers, made by your office in favor of James B. Goodman for land erroneously sold.

The Comptroller refers to the fact that, in his *ex parte* affidavit, Mr. Goodman had sold and conveyed to third parties all his right, title, and interest in said land; that he made said sale under a warranty deed, and that he had made good his warranty. He further asks that repayment, under the act of June 16, 1880, be made to him.

The Comptroller further calls attention to the fact that there is no other evidence of his having made good his warranty than his own statement. He then quotes from section 2 of the act of June 16, 1880, which provides for repayment in certain cases to the person who made such entry, or to *his heirs or assigns*. He further says:

This act would seem to give the assignee of said James B. Goodman the right to this money, and a release of all the assignee's right, title and interest derived through and under cash entry No. 14,175, would seem necessary in order to entitle any one to the repayment provided for by said act.

I therefore return the papers, and respectfully suggest that Mr. Goodman be required to furnish evidence that he did in fact make good his warranty, and as alleged by him, and also obtain a release from his grantee to the land involved.

I think the point made by the Comptroller is well taken, and you will take the proceedings necessary to secure the evidence suggested in the language above quoted, after which you will again transmit the papers to this Department for further action.

EXTENSION OF TIME FOR PAYMENT—EQUITABLE ACTION.

LIZZIE ANTHONY.

A showing made for the purpose of obtaining an extension of time for payment may not warrant an allowance of the request, but may be accepted, in connection with the final proof, as justifying equitable action in the event of subsequent payment, and the requisite proof of non-alienation.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 1, 1893.

I have considered the appeal of Lizzie Anthony from your decision of July 11, 1892, refusing to grant her one year of time to pay for her land, to wit, lot 4, SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 5, T. 151 N., R. 61 W., Grand Forks, North Dakota.

She filed her pre-emption declaratory statement for the land July 17, 1889, alleging settlement on the 12th of the same month; she made final proof May 6, 1892. She is a single woman. Her improvements are shown to consist of a good house, a well of water, and ten and one-half acres of breaking, all estimated at from \$200 to \$250. She filed her affidavit, which was duly corroborated, on May 6, 1892, asking one year in which to make payment for the land, and set forth that she had lost five and one-half acres of flax by the frost. It is suggested in your letter, refusing her the time asked, that five and one-half acres of flax being killed by frost would hardly bring her within the purview of joint resolution of September 30, 1890, (26 Stat., 684) and the provisions of circular of October 27, 1890, (11 L. D., 417).

The year asked for has elapsed nearly two months since, but as the papers have been on file, her rights are preserved. The joint resolution referred to provides for an extension of time of payment when it is shown by the settler that he, "by reason of a failure of crops, for which he is in no wise responsible, is unable to make the payment on his homestead or pre-emption claim, required by law," etc., and the Commissioner is authorized to extend the time not to exceed one year.

It is said that this entrywoman expected in addition to the crops raised, to borrow money to make her payment. It was not in the contemplation of Congress to extend the time to enable an entryman to borrow money to pay out on the land; this condition could have been foreseen, and while it is unfortunate that this woman has made the improvements that she has, and that she could not raise the money to make payment, yet I cannot find any authority in the resolution for extending the time of payment, on the showing made. However, inas-

much as this woman has made the improvements on the land, and resided there in good faith, and offered her final proof in time, and inasmuch as she did sustain some loss of crops, for which she was not responsible, and as the proof is satisfactory, and there is no protest against her proof, or adverse claimant to the land, you will return the final proof to the local officers, and if the entrywoman shall, upon notice hereof, file an affidavit of non-alienation and pay the entry price for the land, the final proof will be accepted, certificate issued, and the entry referred to the board of equitable adjudication for its consideration, under the appropriate rule.

INDIAN LANDS—ALLOTMENT—PATENT.

FLORENCE MAY REE.

When an allottee dies after selection and prior to approval, the allotment will upon approval be confirmed to the heirs of the deceased allottee.

The Department will allow a change of a selection even after approval, if it be shown to be for the best interest of the allottee, but such change can not be made, even before approval, except with the consent, and under the direction of the Department.

Patent should issue in the name of the heirs generally, where the allottee dies prior to the issuance of patent.

Acting Secretary Sims to the Commissioner of Indian Affairs, August 2, 1893.

By letter of July 14, 1893, you submitted a request upon behalf of the heirs of Florence Mary Ree, an Indian allottee at the Yankton Agency, South Dakota, that the selection made by said allottee may be changed in order to locate her allotment near those of her sister and mother and ask to be instructed as to whether an allotment made in the field shall be confirmed to an allottee who dies between the date of the selection and the approval of the schedule by the Department and also as to whether a patent issued upon such an allotment should issue to the heirs by name or to the heirs generally.

The first question propounded came up in connection with allotments upon the Sioux lands under the provisions of the act of March 2, 1889, (25 Stats., 888) and was submitted to the Assistant Attorney General for his opinion. He held that in case of the decease of an allottee after selection and prior to approval thereof the allotment should be confirmed to the heirs of such allottee and that opinion was adopted by the Department, (14 L. D. 463). The provisions of said act of 1889 are the same as to the matter under consideration as those of the general allotment act of February 8, 1887, (24 Stats. 388) and the same rule should govern under both acts. You are advised that the Department holds that when an allottee dies after selection and prior to approval the allotment will upon approval be confirmed to the heirs of such deceased allottee.

This Department will allow a change of a selection for allotment even after approval if it be shown to be for the best interest of the allottee but such change cannot be made even before approval except with the consent and under the direction of the Department. George Price 12 L. D. 162.

As to the form of the patent in those cases where the allottee dies prior to the issuance of patent it was held on April 12, 1893 in the case cited by you, that of Dr. McKay, that the patent should issue to his heir by name and this course has been followed in other cases. In that of Pretty Crazy Eyes (15 L. D. 76) it was said that the heir might relinquish the patent theretofore issued and that the new patent should be issued to the father as heir upon due proof of heirship. No discussion of the question as to whether a patent for lands of a deceased allottee should be issued to the heirs generally or to them by name is found in either of those cases nor has any general rule been adopted so far as I am informed.

In the issuance of patents to others than Indians the rule is that where one entitled to a patent dies, the patent shall issue in the name of the heirs generally without specifically naming them. Clara Huls (9 L. D. 401). Instructions (13 L. D., 49).

One of the strong arguments in favor of this practice is the fact that it is difficult for this Department to determine with certainty the heirship in any given case and that this may be more readily and certainly determined in the courts. This fact would seem as pertinent to the cases affecting the title to Indian allotments as those under the general laws. In the general allotment act of February 8, 1887, (24 Stats., 388) it is provided as follows:

That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the lands thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom the allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian or to his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

There is nothing in this general provision of the law to take these cases out of the general rule but on the contrary it favors the conclusion that the proper rule for such cases is that laid down in the Huls case (*supra*). The land is to be held in trust for the allottee or his heirs according to the laws of the State or Territory where it is located, and the courts of such State or Territory are the tribunals best prepared to determine such heirship.

After a careful consideration I have concluded that these patents should issue to the heirs generally of the deceased allottees and not to them by name and you will be governed accordingly.

ACT OF JUNE 3, 1878—STONE LAND.

MORDECAI v. STATE OF CALIFORNIA.

Land more valuable for the stone found thereon than for agricultural purposes, or grazing, is subject to entry under the act of June 3, 1878.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 2, 1893.

On the 1st of December, 1891, George W. Mordecai made his sworn statement under the act of June 3, 1878, (20 Stat., 89) for the purchase of lots 5 and 6 of Sec. 24, and lots 7 and 8 of Sec. 25, T. 10 S., R. 21 E., M. D. M., Stockton land district, California. He alleged the land to be unfit for cultivation, and valuable chiefly for its stone.

On the 11th of December, 1891, the State of California presented its application to select as school indemnity, lots 5 and 7 of Sec. 24, and lots 6, 7 and 9 of Sec. 25, and filed a protest against the allowance of the application of Mordecai, setting forth that his application to purchase was not made for his own exclusive benefit, and that the land was not of the character that the government contemplated should be sold under the act of June 3, 1878, it not being chiefly valuable for either stone or timber thereon, but more valuable for grazing and pasture.

At the time set for Mordecai to make the proof necessary to entitle him to enter the land, the State by its attorneys, appeared and cross-examined the claimant and his witnesses, and submitted testimony in support of its protest.

On the 30th of April, 1892, the local officers united in a decision in favor of Mordecai, which was affirmed by you on the 27th of July, of that year. An appeal from your decision brings the case to the Department, it being insisted that your decision is contrary to law, and to the evidence in the case.

At the hearing there was considerable conflict of opinion between the witnesses of the respective parties, concerning the quality and value of the granite with which the land was shown to abound, and concerning the value of the land for pasturage.

The claimant testified emphatically, that the entry was solely for his own use and benefit, and that no person, corporation or company, had any interest, directly or indirectly, therein.

It was shown that the land in contest lies on the steep slope of a mountain, and is a mass of granite rock, sparsely covered with decomposed granite sand in spots, on which a scanty vegetation grows in the winter season; that it is rough and rocky, covered with boulders and sharp jutting ledges of rock, being totally and wholly unfit for cultivation, and that there was a valuable ledge or quarry of building granite on the claim, at least a quarter of a mile in length, and extending one hundred and fifty feet above the San Joaquin River.

An expert quarryman, who was sworn as a witness for the claimant, testified that an extensive ledge of granite, valuable for building purposes, exists on the land, and that such ledge contains a vertical, as well as horizontal bed seam. He also testified that the granite was equally as good in quality as the Raymond granite, the market value of which was ninety cents a cubic foot; that the cost of getting out the Raymond granite, and hauling it several miles to the cars, was thirty cents per cubic foot, twenty cents of which was for quarrying. He further said it was practicable to quarry granite on Mordecai's claim with profit.

The contestant's expert witness testified that the granite was suitable for the construction of dams, and would be worth seventy cents per cubic foot on the ground, for that purpose.

It was shown that the total amount of land on the claim which produced vegetation, was twenty-four acres, in scattered spots, and that the renting price of grazing land of that character, was twenty-five cents per acre for the season.

A preponderance of the evidence clearly shows that the claim is more valuable for its stone than for agricultural or grazing purposes, and that the claimant is an applicant for the land in good faith, and has made no agreement, express or implied, to convey the land, or to take the same up for the use, benefit or behoof of any company or corporation, or of any person other than himself.

I think the land was of the character that the government contemplated should be sold under the provisions of the act of June 3, 1878; that Mordecai applied to purchase the land under said law, on account of the stone thereon; and that the title which he seeks to acquire is not for the use and benefit of some other person or persons, or association of persons, other than himself. The decision appealed from is accordingly affirmed.

PRACTICE—APPEAL—NOTICE—RULE 48.

BUTCHER v. AVERILL.

An appeal to the Department will not be considered in the absence of notice to the opposite party, although the appeal of such party to the Commissioner was dismissed for failure to file the same in time.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 2, 1893.

On the 13th of January, 1888, Chilli Averill made timber culture entry for the NE. $\frac{1}{4}$ of Sec. 34, T. 25, S., R. 23 E., M. D. M., Visalia land district, California.

On the 28th of July, 1890, Henry W. Butcher filed affidavit of contest against said entry, alleging that the entryman had failed to comply

with the law under which his entry was made, specifying in what particulars he had made default.

A hearing was ordered, which took place on the 5th of November, 1890, and resulted in a decision by the local officers on the 28th of March, 1891, in which they dismissed the contest of Butcher, and allowed the entry of Averill to remain intact, subject to compliance with the timber culture law.

*From that decision Butcher filed an appeal to your office, which was dismissed by you on the 9th of May, 1892, on the ground of not having been filed in time. You then considered the case under Rule 48 of Practice, and reversed the decision of the local officers, as not being in accordance with existing laws and regulations, and held the entry of Averill for cancellation on the ground that he had failed to comply with the requirements of law during the second year, and up to notice of contest.

The appeal filed by Averill from your decision, upon which he sought to bring the case to the Department bore no evidence of service of notice thereof upon the appellee, and you therefore returned the same, under Rule 82 of Practice, and directed the local officers to notify him that he would be allowed fifteen days within which to amend the defect.

Such notice was given on the 19th of August, 1892, by registered letter, which was duly received, according to the return card, and on the 24th of September, 1892, the local officers returned the appeal to your office, accompanied by the statement that more than fifteen days had elapsed since notice of the defect in his appeal had been served on Averill, and he had taken no action in the matter. You thereupon transmitted said appeal to the Department.

Rule 82 of Practice provides that "when the Commissioner considers an appeal defective, he will notify the party of the defect, and if not amended within fifteen days from the date of the service of such notice, the appeal may be dismissed by the Secretary of the Interior, and the case closed."

Rules 86 and 93 of Practice, require that notice of appeal, with specification of errors, must be served on the appellee, or his counsel, within sixty days from the notice of the decision from which an appeal is proposed to be taken, and the Department has uniformly held that "an appeal from the Commissioner's decision will not be entertained in the absence of notice to the opposite party." *Baird's Heirs v. Page* (9 L. D., 188); *Huntoon v. Devereux* (10 L. D., 408).

The appellant has not complied with the Rules of Practice, and the decisions of the Department, and his appeal is accordingly dismissed.

TIMBER CULTURE APPLICATION—SUCCESSFUL CONTESTANT.

JOHN C. PURCELL.

A successful timber culture contestant, who files an application to enter under the timber culture law at the time of initiating contest, and secures a judgment of cancellation prior to the repeal of said law, but fails to exercise his preference right until after said repeal, is protected by the terms of the repealing act, where it appears that his failure is due to the fact that he did not receive notice of the cancellation.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 3, 1893.

John C. Purcell has appealed from your decision of July 21, 1892, holding for cancellation his timber-culture entry, made February 21, 1892, for the SE. $\frac{1}{4}$ of 6, T. 30, R. 34, Garden City land district, Kansas.

It appears that Purcell had contested the prior timber-culture entry of one Oliver H. King; that as the result of said contest King's entry was canceled by your letter of October 7, 1890; that notification of such cancellation was sent C. W. Wadsworth, attorney of record for said Purcell—which notice was receipted for by George T. Crist, of the firm of "Wadsworth and Crist," Santa Fe, Kansas, October 20, 1890. Your decision holds that "notice to Purcell's attorney was notice to him;" and that by his failure to make entry under his preference right, and prior to March 3, 1891 (the date of the passage of the act repealing the timber-culture law—26 Stat., 1095), he forfeited all claim to the land.

It appears, from the first paragraph of your decision, that at the time of initiating his contest, Purcell filed a timber-culture application and affidavit. He now makes affidavit that he never received notification of the cancellation of said entry; and he submits the affidavit of one George T. Crist, who states that for some years prior to 1890, he was partner with said Wadsworth in the real estate and loan business; that some time in October, 1890, he received and receipted for a letter directed to said Wadsworth, containing a notice of the cancellation of the timber-culture entry of Oliver H. King; that at the time of receiving said letter, said Wadsworth was not a partner of affiant, and was not a resident of the State of Kansas; and that affiant did not mail said letter to the appellant, nor give him notice of its contents, "believing it to be of no consequence."

The registry return receipt, signed, "C. W. Wadsworth, per Geo. T. Crist," would seem to corroborate the above statement.

It appears that Purcell knew nothing of the cancellation of King's entry until he made inquiry at the Garden City land office; that promptly thereafter (within thirty days) he applied to enter the land; and that no other rights have accrued.

In view of the facts set forth, it is my opinion that Purcell had a *bona fide* claim initiated before the passage of the act repealing the timber-culture law, and his entry should be allowed to remain intact.

Your decision holding the same for cancellation is therefore reversed.

CHARLES H. MOORE ET AL.

Motion for review of departmental decision of March 1, 1893, 16 L. D., 204, denied by First Assistant Secretary Sims, August 4, 1893.

APPLICATION TO ENTER—PRACTICE.

JERRY WATKINS.

An application to enter, presented while the land in question is involved in the pending application of another, should be held to await the final disposition of the prior application.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 8, 1893.

Jerry Watkins has appealed from your decision of July 2, 1892, sustaining the action of the local officers in rejecting his application to make homestead entry of the SW. $\frac{1}{4}$ of Sec. 27, T. 126, R. 51, Watertown land district, South Dakota.

The local officers rejected said application because—

Said land is embraced in the application of H. E. Greene, previously presented and rejected, April 23, 1892 Thirty days from receipt of notice of my letter to Greene were allowed him within which to appeal; during said time the land in question is segregated, and not subject to your application.

Watkins contends that the fact that Greene had been allowed thirty days in which to appeal was not sufficient reason for rejecting his (Watkins') application, and that you were in error "in holding that the said tract was segregated and not subject to entry."

The local officers may have used too strong an expression in saying that the tract "is segregated" by Greene's application; but they were correct in so far as they held that Watkins' entry ought not to have been allowed under the circumstances set forth. The proper practice would have been to have received the application, noting the date of its presentation, and held it to await the time allowed him [Greene] to appeal; and in case the latter failed to appeal within the time prescribed, then Watkins' application should have been allowed as of the date when presented.

It appears that Greene, within the thirty days allowed him, appealed to your office, where said appeal was pending at the date of your decision adverse to Watkins; that since the date of said decision in Watkins' case you have rendered a decision adverse to Greene; and that Greene has appealed to the Department, where his case is still pending (Vol. 18, No. 224).

Under the circumstances Watkins' application ought still to be held awaiting final action on Greene's application; and in case the decision of the Department shall—when his case is reached—be against Greene,

then Watkins' application may be allowed as of the date when presented, if no other objection appears than the prior application of Greene.

Your decision is modified as herein indicated.

PRE-EMPTION—REPEAL—SUCCESSFUL CONTESTANT.

CHARLES MOORE.

A contestant who begins his suit prior to the repeal of the pre-emption law, but does not secure a judgment of cancellation until after said repeal, has no right under said law that falls within the protection extended by the repealing act to claims "lawfully initiated."

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 9, 1893.

I have considered the appeal of Charles Moore from your decision of September 13, 1892, affirming the judgment of the local officers rejecting his pre-emption declaratory statement for the SE. $\frac{1}{4}$ of Sec. 32, T. 16 N., R. 20 W., Grand Island, Nebraska, land district.

The record shows that one Emma E. Day had made a timber-culture entry, No. 5991, for said land. In August, 1890, Moore initiated a contest against it; and on April 2, 1891, Day's entry was canceled upon said contest; thereupon Moore was awarded a preference right of entry of said land, under the act of May 14, 1880. (21 Stats., 140).

No step or action asserting his preference right seems to have been taken by Moore within thirty days after notice of said cancellation, nor until the 28th day of June, 1892, when he filed in the local office a pre-emption declaratory statement for said land, alleging settlement thereon June 27, 1892.

The local officers rejected his application, on the ground that the pre-emption law is repealed, and that he failed to show that his filing was initiated prior to the repeal of said law.

On the 2nd of July, 1892, Moore filed in the local office his own affidavit, (and a corroborating affidavit of one Sidney Moore, both dated July 1, 1892) alleging: That about August, 1890, he contested a timber-culture entry on the land aforesaid, and that about the same date, "he offered to make declaratory statement entry of said premises, and that the same was rejected and refused by the Hon. Register and Receiver until such time that said entry of timber-culture should be canceled;" and that after hearing the contest, "upon the evidence duly taken, the General Land Office canceled said entry and gave this affiant a preference right of filing on said premises." The affiant reiterates his original intention,—(at the time of the initiation of his contest against Emma E. Day)—"to file his declaratory statement on said premises."

On the 23d day of June, 1892, Moore appealed from the judgment of the local officers rejecting his application.

On the 13th of September, 1892, your office affirmed the decision of the register and receiver. Moore appealed from said decision.

In his appeal he in substance claims:

That by his successful contest of Emma E. Day's timber-culture entry (5991) he acquired a preference right of entry under the pre-emption law aforesaid, "a long time prior to the repeal of the pre-emption law:" That "said contest was decided prior to repeal of the pre-emption law:" And that the initiation of his contest with Emma E. Day on the 1st day of August, 1890, in respect to the land in question, was a lawful initiation of his present *bona fide* claim, within the meaning of the last clause of the 4th section of the act of March 3, 1891, repealing the pre-emption laws. (26 Stats., 1095.)

The contest was not decided until April 2, 1891, the day on which the Commissioner of the General Land Office canceled the timber-culture entry; for the findings and opinions of the register and receiver reported in January, 1891, were of no effect until confirmed by the Commissioner. (Rules of Practice 43 to 53.)

The contestant's preference-right of entry as defined by the second section of the act of May 14, 1880, *supra*, did not and could not accrue, until he had "procured the cancellation of the timber-culture entry" contested.

When he had accomplished this, April 2, 1891, the preference right of entry awarded him, became and was worthless, because Congress had thirty days before repealed all the pre-emption laws, withdrawn from entry by pre-emption all the public lands, and put an end to all proceedings in pre-emption cases, except as follows:

But all *bona fide* claims, lawfully initiated, before the passage of this act, (March 3, 1891) under any of said provisions of law so repealed, may be perfected upon due compliance with law, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this act had not been passed.

Therefore, unless the appellant can bring his case within the terms of this exception, he has no case at all.

His claim is, the right to enter and pre-empt a certain tract of public land. He initiated this claim by tendering on the 28th of June, 1892, his declaratory statement in which he says: "I have on the 27th day of June, 1892, settled and improved" the land described. In his affidavit filed July 2, 1892, he does not claim any settlement or improvement made by him prior to said 27th of June. Indeed he could not even before the repealing act was passed, have lawfully made entry, settlement or improvement on the land, so long as it was covered by the timber-culture entry which he contested. (*Bentley v. Bartlett*, 15 L. D., 179 and other cases therein cited). Said cover remained until after Congress had taken away all lawful rights of entry, or settlement with a view to pre-emption; so that at no time has it been in the power

of the appellant to lawfully initiate his pending claim. (A. W. Hendrickson, 13 L. D., 169; Alice Carter, 15 L. D., 539; Thos. M. Sparrow, 14 L. D., 417.)

It is impossible to conceive any good reason for claiming that the initiation on the 1st of August, 1890, of a contest against Day's timber-culture entry, can be considered as an initiation of the appellant's claim of a right of pre-emption. The one was preliminary and antecedent to the other. The one was to be successfully ended before the other could begin. The cancellation must be procured, before any right of pre-emption could exist.

But even if mere chronological relation could give color of support to the contention that the initiation of the contest was the initiation of the pending claim, the question would remain: Has the appellant complied with the law that was before the repeal? He did not file his declaratory statement for more than fifteen months after the repeal, and more than fourteen months after he had procured the cancellation of the timber-culture entry which he contested. He does not complain of want of notice of either of these events. It would be impossible to believe that he did not have notice of them both. And for the purposes of this appeal it must be conclusively presumed, that the local officers gave the appellant the notice required by your letter "H" of April 2, 1891, which ended the Day contest.

Your decision is affirmed.

CONTESTANT—TIMBER LAND ENTRY.

OLMSTEAD *v* JOHNSON.

The successful contestant of a timber land entry is entitled to a preferred right of entry under the act of May 14, 1880.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 9, 1893.

This is an appeal by Catherine Johnston from your decision dated April 23, 1892, in the case of William E. Olmstead *v*. said Johnston, involving lot 7, Sec. 6 and lots 1 and 2, Sec. 7, T. 3 N., R. 2 E., Humboldt, California.

Prior to April 25, 1891, the said tract was embraced in the timber land entry of Alice M. Milligan. Olmstead contested this entry and thereupon, by letter "H" dated April 25, 1891, you canceled it.

On May 4, 1891, Johnston was permitted to file her timber land statement for the land.

On May 16, 1891, Olmstead claiming a preference right by reason of his successful contest against the Milligan entry, presented his timber land statement for the land which being rejected by the register and receiver for conflict with that of Johnston, he (Olmstead) appealed.

Pending his appeal Olmstead on July 14, 1891, filed an affidavit of contest alleging that Johnston's statement was filed in the interest of her husband, a transferee of Milligan, and that he (Olmstead) was entitled to a preference right of entry.

You advised the local officers that no decision would be rendered upon Olmstead's appeal until after the hearing on said contest.

The local officers transmitted the papers with a request that you pass upon Olmstead's appeal, and a stipulation to continue the contest case to July 16, 1892.

Thereupon you rendered your said decision of April 23, 1892, whereby you held that Olmstead, by reason of his successful contest was entitled to a preference right of entry.

You accordingly allowed Olmstead's statement and held that of Johnston for cancellation. From this judgment Johnston appeals here, and alleges that no mention of timber land entries being made in the act of May 14, 1880, conferring for the period of thirty days a preference right of entry upon successful contestants who have "procured the cancellation of any pre-emption, homestead or timber-culture entry," Olmstead acquired no such right and that consequently Johnston's statement being first in point of time should prevail.

This contention is without force. In the case of *Fraser v. Ringgold* (3 L. D., 69) it has been held that a successful contestant against a desert land entry was entitled to a preference right of entry under the act of May 14, 1880, "inasmuch as said law is remedial and this class of entries, if not embraced by the letter are within the reason and purpose of the statute." This ruling has been uniformly followed and as you have well held "the same reasons for giving the successful contestant of a coal land entry, a desert land entry, and swamp land selection the preference right of entry will apply in the case of a timber land entry." Your judgment is accordingly hereby affirmed.

HOMESTEAD—SECOND ENTRY—AMENDMENT.

HENRY KRATZ.

The right to make a second homestead entry under section 2, act of March 2, 1889, can not be invoked in aid of an application to "amend" an entry made and relinquished after the passage of said act.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 10, 1893.

Henry Kratz has appealed from your decision of September 28, 1892, affirming the action of the register and receiver denying his application to make homestead entry of the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and lots 6 and 7 of Sec. 19, T. 5 N., R. 5 W., Oregon City, Oregon.

It appears that said Kratz filed his pre-emption declaratory statement on July 5, 1889, for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$,

and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 29, T. 7 N., R. 4 W., of the same land district, and transmuted the same to homestead entry on September 19, of that year.

On January 30, 1890, he voluntarily relinquished all right and title to the land embraced in his entry, and, on January 13, 1892, he filed his application "to amend my said homestead entry," for the land last above described, "so as to be for and embrace" the land first above described.

From the statement made by the applicant, as set forth in your said decision, it does not appear that there were any obstacles which could not have been foreseen, which would have rendered the cultivation of the land impracticable; indeed, applicant lived on the land nearly three months and then transmuted his filing.

It is the duty of every one seeking to enter land to make a careful examination of the same before entry. There may be cases of a peculiar or exceptional character in which a second entry would be permissible; but such circumstances are not shown in this case, nor will a second entry be allowed by reason of erroneous advice given by one "represented to be well posted in the land laws," and whose advice, to the effect that "Congress had passed a law lately, allowing persons to file a second homestead entry," causes a relinquishment of a former entry.

It is true that the 2d section of the act of March 2, 1889 (25 Stat., 854), gives the right of entry to any person "who has not heretofore perfected title to a tract of land of which he has made entry under the homestead laws," but that act does not apply to cases wherein an entry is made after its passage, the law in such cases remaining unimpaired, as set forth in section 2298 of the Revised Statutes.

Having relinquished his entry voluntarily and unconditionally, there was no homestead entry "to amend," and the rejection of his application on the showing made was proper.

The decision appealed from is accordingly affirmed;

SISSETON INDIAN LANDS—SETTLEMENT.

MADILLA O. WILSON.

The act of March 3, 1891, opening to entry the Sisseton lands contains no penalty for entering the reservation prior to the time fixed therefor in the President's proclamation, and, although said proclamation forbids such entrance, the right of entry is not forfeited by failure to observe said injunction.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 10, 1893.

I have considered the appeal of Madella O. Wilson, from your decision of June 18, 1892, holding for cancellation her homestead entry for the

NW. $\frac{1}{4}$ of Sec. 34, T. 122 N., R. 51 W., Watertown land district, South Dakota.

On the same day that the appeal was filed, an application for a rehearing was filed, which was considered and rejected. The appeal brings the entire case before me.

This land is in the Sisseton and Wahpeton Indian reservation, which was opened to settlement by the President's proclamation, dated April 11, 1892, in pursuance of the act of Congress of March 3, 1891, (26 Stat., pp. 1036-1038, Sec. 30). The hour fixed for the entrance of settlers upon said land was twelve o'clock, noon, (central standard) on the fifteenth day of April, A. D., 1892. The proclamation contains the following:

Warning, moreover, is hereby given that until said lands are opened to settlement, as herein provided, all persons save said Indians, are forbidden to enter upon and occupy the same, or any part thereof.

The Secretary of the Interior caused a list of the lands so to be opened for settlement, to be published over his signature, and he repeated this warning.

This entrywoman filed an affidavit in her case on April 30, 1892, in which she avers that she settled upon said tract one minute after 12 o'clock, mean standard time, on April 15, 1892; she says:

Just prior to 12 o'clock, noon, of April 15, 1892, I was upon the "right of way" of the Hastings and Dakota Railroad Company, which "right of way" runs or passes directly through said NW. $\frac{1}{4}$ of Sec. 34, T. 122 N., R. 51 W. That I went upon said "right of way" on the evening of April 14, 1892, for the purpose of making settlement upon the above described tract immediately after noon, standard time, April 15, 1892.

You hold that under said proclamation and Miss Wilson's statement, she is prohibited from making entry, and the same was held for cancellation. You cite in support of this, certain cases in Oklahoma. I call your attention to section 30 of the act of March 3, 1891, (26 Stat., 1039) opening the Sisseton lands, which reads as follows:

That the lands by said agreement ceded, sold, relinquished, and conveyed to the United States shall immediately, upon the payment to the parties entitled thereto of their share of the funds made immediately available by this act, and upon the completion of the allotments as provided for in said agreement be subject only to entry and settlement under the homestead and townsite laws of the United States, excepting the sixteenth and thirty-sixth sections of said lands, which shall be reserved for common school purposes, and be subject to the laws of the State wherein located: *Provided*, That patents shall not issue until the settler or entryman shall have paid to the United States the sum of two dollars and fifty cents per acre for the land taken up by such homesteader, and the title to the lands so entered shall remain in the United States until said money is duly paid by such entryman or his legal representatives, or his widow, who shall have the right to pay the money and complete the entry of her deceased husband in her own name, and shall receive a patent for the same.

And I desire to place beside the same a portion of section 13 of the act of March 2, 1889, opening Oklahoma, (25 Stat., 1005), which reads as follows:

That the lands acquired by conveyance from the Seminole Indians hereunder, except the sixteenth and thirty-sixth sections, shall be disposed of to actual settlers

under the homestead laws only, except as herein otherwise provided (except that section two thousand three hundred and one of the Revised Statutes shall not apply: but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision, shall ever be permitted to enter any of said lands, or acquire any right thereto.

It will be observed that there is a radical difference in these two statutes. In the former there is no sort of penalty laid against the party who goes upon the reservation. In fact, there is nothing there prohibiting his going upon the reservation at any time he sees fit to do so. While in the latter, the language of the statute is "but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision, shall ever be permitted to enter any of said lands or acquire any right thereto."

Under the latter section, whoever went upon the prohibited territory prior to the time of the issuing of the proclamation, forfeited his right to acquire any right or title to the land forever. While in the former, the only language which relates to the homesteading of the land, is "that patent shall not issue until the settler or entryman shall have paid to the United States the sum of two dollars and fifty cents per acre for the land taken up by such homesteader, and the title to the land so entered shall remain in the United States until said money is duly paid by such entryman or his legal representative, or his widow, who shall have the right to pay the money and complete the entry of her deceased husband in her own name, and shall receive a patent for the same."

Now, I submit that the President of the United States, under this section, has no authority to declare a forfeiture of the right of this woman who went upon the right of way of the Hastings and Dakota Railroad Company a few minutes before the land was subject to entry. There is neither an inherent nor an implied power vested in the executive to visit such a penalty upon the entryman. Hence, when you attempt to apply the law to this reservation, which was made applicable to the Oklahoma lands, and rule the same by the decisions which were made applicable thereto, you are doing violence to the provisions of the statute under which Mrs. Wilson is seeking to acquire title.

While the proclamation warned all people not to go upon the lands until they were opened for settlement, and they were forbidden so to do, yet, there is nothing in the statute which authorized the injunction, or justified the visiting of the penalty of the forfeiture of the right upon her for so doing. Indeed, the proclamation does not attempt to do so. Your decision is therefore reversed, and the entry will remain intact.

HOMESTEAD ENTRY—FINAL PROOF—PATENT.

BROWN *v.* HUGHES' DEVISEES.

The administrator of a deceased homesteader has no authority under the law to submit final proof for the benefit of devisees.

In the submission of final homestead proof by a devisee the proof must be directed to the entry as an entirety and not confined to that part of the land claimed by the devisee. But proof thus submitted without objection should not be rejected without consideration or the allowance of a further hearing.

In the event of a homesteader's death, final proof may be submitted by any one of the devisees, and if such proof is found satisfactory, the certificate should issue in the name of the devisees of the said homesteader generally.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 10, 1893.

I have considered the case of L. L. Brown *v.* John Hughes' devisees, on the appeal of R. G. Brooks, one of said devisees, from your decision of April 4, 1892, involving the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 32, T. 1 N., R. 13 E., The Dalles, Oregon, land district.

The record shows that on December 29, 1881, John Hughes made homestead entry for said land; that he died on the 2d day of March, 1886, unmarried, leaving a will by the terms of which he devised to D. R. Hurlburt the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ to Florence Jordan the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and to R. G. Brooks the remainder of the tract embraced in his entry. In the will D. R. Hurlburt was appointed executor, but he failed to qualify as such; the will being admitted to probate, one O. W. Cook was appointed as administrator with the will annexed, by the probate court having jurisdiction over the matter.

On the 15th of October, 1888, Hurlburt relinquished to the United States his interest in the land.

On November 21, 1888, L. L. Brown filed his pre-emption declaratory statement for the land embraced in Hughes' entry.

By letter, dated May 27, 1889, you directed the local officers "to advise the devisees of Hughes that they would be allowed 60 days in which to submit final proof."

August 9, 1889, Brooks submitted proof as to the land devised to him, at which time Brown appeared and protested against the proof, and a hearing was had. You state, in your decision appealed from, that the register and receiver "found for Brown."

I am unable to find, among the papers transmitted in the case, any opinion or paper purporting to be the decision of said officers, other than the following memorandum endorsed on the back of the final proof papers: "Rej. Oct. 17, 1889. Res., cult. and improvement of Jno. Hughes insufficient." This is not signed, and there is nothing to show by whom it was made. If this is all of the record of the action of the local officers in deciding the matter, then, it shows an inexcusable neglect on their part to comply with Rule 51 of the Rules of Practice, which

requires them, upon the termination of a contest, to render "a joint report and opinion in the case," etc.

Florence Jordan, who is shown to be a minor, was not notified as directed by your letter of May 27, 1889, until November 2, 1891, and on the 8th day of January, 1892, she, by her guardian, submitted final proof as to all of the land in Hughes' entry, and the local officers approved her proof and issued final receipt thereon.

On April 4, 1892, you held that the proof of Brooks could not be considered, "for the reason that final proof, when made, must be for all the land covered by the entry, and, as a consequence, the hearing between Brown and Brooks will not be considered."

You further found that Florence Jordan's final proof was insufficient as to Hughes' residence on the land; that it was not satisfactory, and you rejected it and held the entry for cancellation.

Brooks appeals.

In his appeal he insists that the administrator of Hughes' estate "made a full and complete proof of the residence and compliance with law of and by said Hughes during his lifetime on his entire homestead tract."

I fail to find in the record transmitted any proof, or anything purporting to be the proof offered by Cook, the administrator of Hughes' estate. If final proof was offered by Cook as the administrator, it was a mere nullity, because it is not authorized by law.

Section 2291 of the Revised Statutes must govern in this case. It provides, in case of the death of an entryman, that if—

His widow, or in case of her death, his heirs or devisee proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law.

These are the conditions, and only conditions, applicable to the case at bar; they can only be performed by the heirs or the devisees of the deceased entryman. An administrator is not an heir or devisee by virtue of his appointment; he is not, therefore, authorized, under this section of the statute, to comply with these conditions, and consummate the homestead entry. Section 2292 of the Revised Statutes provides the only conditions under which an administrator may consummate the homestead entry, but that section has no application to the case at bar, for the entryman, Hughes, was a single man and left no "infant child or children."

It is claimed in Brooks' appeal that it was error for you to refuse to consider the proof offered by him, "when the proof went to the entire homestead tract of John Hughes." Brooks' published notice of offering proof only described the portion of land embraced in Hughes' entry

that was devised to Brooks. His proof evidently was only intended to go to a part of the land included in the entry; the entry is an entirety, and the proof should be directed to it as such. If Brooks alone were at fault in the matter of irregularly offering proof on Hughes' entry, then, perhaps, your refusal to consider it might be justifiable, but, in the view I take of the record, your action was erroneous, for it is quite apparent that Brooks was offering proof in good faith; he published the required notice, and filed all the necessary preliminary papers, appeared at the local office pursuant thereto, and put in his proof; the protestant appeared, and protested the proof on other grounds; the local officers raised no objection, but, on the contrary, the register signed and authorized the publication notice, which only included a part of the land in Hughes' entry, they allowed the parties to offer their testimony, and it seems rendered a judgment thereon. Under these circumstances, to decline to consider the proof, and cancel the entry under which it was offered, was equivalent to depriving the party of a right given to him by law, without giving him his day in court; therefore, I have examined Brooks' proof and the testimony submitted at the trial between Brooks and Brown, as well as the proof offered by the guardian of Florence Jordan. I find that her publication notice of final proof covered all the land in Hughes' entry, and the final receiver's receipt was issued to her guardian for all of said land. This was irregular. If Hughes' entry shall go to patent in the end, it will issue under section 2291 of the Revised Statutes to the heirs or devisees of the entryman, leaving the question as to who are his heirs or devisees to be settled by the proper tribunal after patent issued.

In the recent case of *Bernier v. Bernier*, 147 U. S., 242, the supreme court said, on this point:

The object of the sections (2291, 2292) in question was, as well observed by counsel, to provide the method of completing the homestead claim and obtaining a patent therefor, and not to establish a line of descent or rules of distribution of the deceased entryman's estate.

I am satisfied that justice requires that further investigation be had in order to correctly determine the respective rights of the parties; therefore, the proceedings heretofore had in the matter are hereby set aside, and you are directed to cause a hearing to be had before the register and receiver, after due notice to all of the parties, whereat the devisees and all the parties concerned may submit their proofs and testimony in accordance with the requirements of law, and upon the testimony and proof so submitted the case will be readjusted and take its regular course under the rules of practice. Either the guardian or any of the devisees may submit the final proof under Hughes' entry and if final certificate issues thereon it will issue to the heirs or devisees of John Hughes, deceased, and not in the name of the person making said proof. The decision appealed from is accordingly modified.

PRACTICE—NOTICE—PUBLICATION—APPEARANCE.

ROBB v. RILEY.

Service of notice by publication is not authorized in the absence of due order therefor based on a proper showing of diligence, and inability to secure personal service.

An appearance for the purpose of securing an order to take testimony by deposition and a continuance until said testimony is taken and returned is general, and confers jurisdiction on the local office.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 10, 1893.

On the 1st of July, 1884, Austin Riley made timber culture entry for the S. $\frac{1}{2}$ and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and lot 1 of Sec. 22, T. 15 N., R. 40 W., North Platte land district, Nebraska.

On the 13th of December, 1890, Samuel Robb filed an affidavit of contest against said entry, in which he alleged that the trees planted on ten acres of said tract during the fifth year after entry, were wilfully dead prior to July 1, 1889, and that claimant had done nothing on said claim during the sixth year after entry, and that his default existed at that date.

Notice for hearing was issued, and not being personally served, was published in a newspaper printed in the county where the land was located. The published notice directed the testimony to be taken before E. J. Short, a notary public, at Ogalalla, Nebraska, on the 24th day of January, 1891, with final hearing at the local office on the 7th of February, following.

The record contains no order for the service of notice by publication although in your decision you state that such order was made upon an affidavit filed in the local office on the 25th of December, 1890. You also state that said notice was published "once in each week for four successive weeks, beginning on the 25th day of January, 1891, as appears by the affidavit of the foreman of said newspaper."

You are in error as to the date of filing the affidavit for order of publication, and also as to the time of the publication of said notice. The local officers certify that the affidavit was filed on the 24th of December, 1890, and the foreman of the newspaper in which the notice was published, makes affidavit that it "was first published in said newspaper in its issue dated the 25th day of December, 1890."

The proof of the mailing of a copy of said notice to the claimant, and of the posting of a copy thereof upon the land, is the affidavit of the contestant, who makes oath "that on the 23d day of December, 1890, he posted a notice of the above entitled contest, of which the annexed is a true copy, in a conspicuous place on said claim." He then describes the place of posting, and continues his affidavit by saying: "on the 23d day of December, 1890, he mailed a registered letter, containing a

copy of the notice of contest in the above entitled case, of which the annexed notice is a true copy, to Austin Riley, at Lincoln, Nebraska, his last known place of residence." Annexed to his affidavit is a printed and written notice, upon a blank used by the local officers in giving notice of hearings.

The record contains no proof that a copy of the notice was posted in the register's office during the period of publication.

On the 15th of January, 1891, counsel for claimant filed an affidavit stating that his client resided two hundred and fifty miles from the place of trial, was sick, and unable to travel that distance, and he asked that his deposition be taken upon interrogatories and cross-interrogatories. This motion was granted, and the final hearing at the local office was continued until February 25, 1891.

The testimony taken before E. J. Short, on the 24th of January, 1891, was filed on the 28th of that month, and the deposition of claimant, taken at Lincoln, Nebraska, on the 18th of February, 1891, was filed on the 25th of that month, final hearing being continued until the 4th of March, 1891.

On the 14th of March, 1891, the local officers united in a decision, in which they said:

From the testimony, we find that the defendant had fully complied with the timber culture law, up to the spring of 1890. That he had expended a large amount of money and labor on the tract, and that it was no fault of his that he had no stand of timber. That the section of country wherein this claim is situated is dry and arid, and the growth of timber is very uncertain. That the reason why he did not replant to timber, and cultivate the same in the spring of 1890, was his sickness and physical inability to do so. That the season of 1890 was too dry to plant timber with any prospect of growth. We are therefore of the opinion that the claimant has shown entire good faith, and that timber culture entry No. 4189 should not be canceled.

The decision of the local officers was reversed by you on the 26th of March, 1892, and an appeal from your judgment brings the case to the Department.

In their decision, the local officers said "the service by publication was defective," but they did not state wherein the defect consisted. In your decision you state that on the day appointed for taking the testimony in the case, before Notary Public Short, the claimant appeared specially, for the purpose of objecting to the jurisdiction of the Land Department in said contest, and objected to such jurisdiction for the reasons:

1st. Because no legal or proper foundation has been laid by contestant for constructive service of notice in said contest.

2nd. Because no proper or legal service of notice in said contest has been had upon this claimant.

The paper on which such special appearance and objections were written, was endorsed as follows:

Motion overruled for the reason that claimant has voluntarily appeared January 15, 1891, by filing affidavit and interrogatories, without objecting to jurisdiction.

That endorsement is not signed, and there is nothing to show whether it was made by the notary public, or the local officers. It seems safe to assume, however, that it was made by the local officers, as in their decision, after stating that the service by publication was defective, they add that the "defect was cured by voluntary appearance of the defendant." In your decision, you make no allusion to said objections by claimant, further than to copy them therein.

In his appeal to the Department, the claimant makes your failure to pass upon that question his first ground of appeal. His specifications of error are as follows:

1st. Said decision is contrary to law, in that said contest should have been dismissed on claimant's objection to jurisdiction, because of want of due and legal service by publication, and for want of a sufficient affidavit upon which to base constructive service upon in said case.

2nd. Said decision is not supported by the evidence in the case, in that the evidence shows good faith on the part of claimant.

3rd. The Hon. Commissioner misquotes the evidence, when he says that it shows that other parties in the vicinity raised a fair number of trees, both in 1889 and 1890, for the evidence very clearly establishes the fact that during the great drouth season of 1890, nothing grew in that portion of Nebraska. Congress was asked to appropriate money for the settlers, and nearly all the settlers lived on aid furnished by more fortunate friends in the east.

I am clearly of the opinion that the service of notice of contest in this case, did not confer jurisdiction of the person of the defendant upon the local officers. It was not a case in which service by publication could properly be made. The claimant resided in the same State in which the land was situated. His place of residence was endorsed upon his entry papers, and that it was well known to the contestant is evidenced by the fact that he mailed to him at such place, a copy of the notice for hearing, even before he filed his affidavit and application for order for publication in the local office. After the order for publication was made, no copy of the notice was mailed to Riley.

In the case of *Watson v. Morgan, et al.* (9 L. D., 75), it was held that service of notice by publication is not warranted in the absence of an order therefor, based on showing due diligence and inability to secure personal service, and in the absence of legal notice to the defendant, the local office is without jurisdiction.

As already stated, the record does not show that an order for service by publication was ever made by the local officers. They report that affidavit for such order was filed December 24, 1890, but do not state that any action was taken thereon by them. It is certain that the affidavit filed, was not sufficient to justify such order, as it did not show that Riley was not a resident of the State in which the land was situated, nor state that any effort had been made to get personal service upon him.

On the day set for taking the testimony in the case, before the notary public, the claimant appeared specially, by counsel, for the purpose of objecting to the jurisdiction of the local officers, on the ground

that no legal and proper notice had been served upon him. Prior to that time, however, said counsel had appeared in the case, without objection, and had asked that his client's deposition be taken upon interrogatories, and cross-interrogatories, and that the final hearing at the local office be continued until such testimony could be taken and returned. The motion was granted, and the final hearing at the local office was continued until February 25, 1891.

In *Anderson v. Rey* (12 L. D., 620), it was held that "a defendant may so far appear as to object to the jurisdiction of the court, either over the person or subject matter of the suit, and such appearance is special; but, if by motion, or otherwise, he seeks to call into action any power of the court, except such as pertains to its jurisdiction, it is an appearance." In support of that proposition, the cases of *Ulmer, et al. v. Hiatt, et al.* (4 Greene, Iowa, 439) and *Clark v. Blackwell* (*ibid.*, 441), were cited.

Applying this rule to the case at bar, it must be held that the appearance made on the part of Riley on the 15th of January, 1891, was a general appearance in the case, which gave the local officers jurisdiction over his person.

This leaves the case to be determined upon its merits, and from a careful examination of the evidence before the local officers at the final hearing, I am satisfied that the conclusion reached by them was correct.

The contest of Robb is therefore dismissed, and the entry of Riley will be allowed to remain intact, subject to his future and full compliance with law. The decision appealed from is reversed.

SETTLEMENT RIGHTS—OKLAHOMA LANDS.

HURT *v.* GIFFIN.

As between two claimants for Oklahoma lands, each of whom allege settlement in the afternoon of the day on which the lands were opened to settlement, priority of right may be properly accorded to the one who first reaches the tract and puts up a "stake" with the announcement of his claim thereon, where such initial act of settlement is duly followed by the establishment of residence in good faith.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 11, 1893.

I have considered the case of William S. Hurt *v.* Abiel W. Giffin, on appeal by the latter from your decision of March 16, 1892, holding for cancellation his homestead entry for the SW. $\frac{1}{4}$ of Sec. 14, T. 16 N., R. 7 W., Kingfisher land district, Oklahoma Territory; and also from your ruling of May 9, 1892, refusing his motion for a rehearing or new trial.

Austin H. Clinton, Leport Campbell and William A. Jarrett had each initiated a contest against said entry, and by your order of April 2,

1890, the four cases were consolidated, and one hearing was held, embracing all the cases. Clinton and Jarrett each made default at the hearing, and their contests were dismissed by the register and receiver, from which no appeal was taken. Campbell appeared by attorney, and filed in the case his rejected application; his attorneys cross-examined witnesses, but offered no evidence; the local officers dismissed his contest, from which he did not appeal.

This left the contest between Hurt and Giffin only, on the latter's appeal from the decision of the local officers, recommending his entry for cancellation, and on your affirmance of their action, he again appealed.

The testimony is quite voluminous, and somewhat confused by that portion of it relating to Campbell's attempted entry, but having carefully reviewed the entire record, I am clearly satisfied that Hurt was first on the land.

He says he rode a brown horse from the line directly to the land; that he put up a stake on it at 10 minutes past 12 o'clock, noon, April 22, 1889, and put a card on the stake inscribed "This claim taken by W. S. Hurt 10 minutes past 12 o'clock, April 22." He then went to a surveying party near by and assisted in a survey to get a corner of this tract determined. The surveyor, Mr. Miller, ran certain lines and came to the south-west corner of the tract in controversy. He says he saw the stake that Hurt had put up—and he identifies the card offered in evidence, as the one that was on the stake—but he suggested to Hurt that he put up another stake and card and mark the tract more plainly. It appears that Hurt then went a short distance on to the tract, from the south-west corner, and put up a stake about four feet high, and about two inches in diameter, and built a mound up around it, on which he put another and larger card, on which he wrote, "This claim taken, or surveyed, by W. S. Hurt, Co. K., 106 Ills. Vols., 1 o'clock and 25 minutes." He thinks he wrote "surveyed," but says some one took the card, and the word may have been "taken," instead of "surveyed." After this he went to Kingfisher to file a soldier's homestead declaratory statement for the tract, but the office was not open. He says he returned to the land and found three other stakes upon it, one by Busher, one by Jarrett and one by Northup, but saw none by Giffin. He says that he slept on the land that night, in the timber.

Counsel for Giffin say that on cross-examination, Hurt admitted that he did not sleep there. He said on cross-examination that he slept "about forty rods from the west line, and about forty from the north, in the timber, on the creek." This would place him on the land about fifty-six rods south-east of the north-west corner. He was in the line at the land office between 3 and 4 o'clock next morning, and he reached the receiver about 11 a. m., with his papers prepared for a soldier's homestead declaratory statement filing. He was informed by the officers that an en-

try had been made for the land; they took his papers, however, without formally rejecting his application, and he says that he offered to pay the fees and commission, but that the receiver would not take the money. He went out of the office, and back to the land, and that afternoon secured a team and plow, and tried to do some breaking, but the ground was so hard that after scratching a few furrows, he quit. He says he slept on the land again on the night of the 23d and 24th, and a good many nights after that, before he got his house built; he says he was on the land nearly every day in May. He dug a place "like a foundation for a house", and put up four stakes here. Early in May, it having rained sufficiently to moisten the ground, he plowed about two acres of land. He says lumber was so scarce and so high that he was delayed in building his house, but he had it completed in the latter part of July. It is a good frame house, with shingle roof, good siding, papered inside over head and on two sides, and cost about \$108. His family moved into it about August 2 or 3. In May he also planted corn, beans, sugar-cane, etc., and has since made other improvements,—fencing, breaking, etc. His residence has been continuous since his settlement, and his improvements are fairly good, as good, he says, as his circumstances would permit.

Hurt says he never saw Giffin on the claim until about the 6th or 7th of May. Giffin claims that he reached this tract at 12 minutes after 12 o'clock, noon, on April 22, 1889, and set up a piece of shingle four or five inches wide and about a foot long, and placed two clods against it, and wrote on the shingle "I hereby claim the SW. $\frac{1}{4}$ of section 14 as my homestead"; he then rode to the land office, and found a notice on the door saying that the office would not be opened until the next morning, April 23d. That afternoon he and D. K. Cunningham went to Uncle John's Creek for water, (Uncle John's Creek runs across the corner of the land) and he pointed out to Cunningham his shingle.

It appears, however, that during the afternoon of the 22d he went to the NW. $\frac{1}{4}$ of section 22 and put up a stake with a card on it, announcing that he had settled on this tract, and claimed it as his homestead. He staid in Kingfisher that night, and on the morning of the 23d he was in line at the land office, being number six, with papers prepared to enter the NW. $\frac{1}{4}$ of section 22. One, Erwin was in line immediately in front of him.

It appears that he had some intimation that Erwin had selected this tract, for he offered him \$500 if he would exchange places and give him (Giffin) the first chance. Erwin asked to see his papers, and on their being produced, refused the \$500, and told Giffin that he had settled on the tract and intended to enter it. Giffin then said that he would get a tract near town; he sent for a pen and some ink, and changed the description in his application, while in line, to make it cover the land in controversy, and being in front of Hurt, secured the entry which he claims. He claims that he did not abandon his settlement on sec-

tion 14 when he made his settlement on section 22, but says he had papers partly made up for both, so that if he could not get the SW. $\frac{1}{4}$ of section 14, he would take the NW. $\frac{1}{4}$ of section 22, but it is quite evident that he intended to take the NW. $\frac{1}{4}$ of section 22.

Harper H. Allen testifies that he was in the line on the morning of the 23d, heard some talk between Erwin and Giffin, saw Giffin take out his entry papers, and saw the description, and knows it was in section 22; he was interested in that section, and says he is not mistaken, as he was close to Giffin, but behind him.

Giffin, it appears, did not return to the land in controversy until some time early in May, but he has built a house and made quite extensive improvements, and has his family there and resides upon the tract. It is shown that his improvements are more valuable than those of Hurt, but this does not enter into the determination of the case, as Hurt's good faith is not seriously questioned.

Giffin, when on the stand, said, "I am claiming the land now in dispute by reason of prior settlement, and by reason of my homestead entry." He does not know of any one who saw the shingle, except Cunningham.

Cunningham testifies that on the afternoon of the 22d of April, 1889, he and Giffin went to the creek to get a pail of water, "crossed over the land in dispute, and while on the land, Mr. Giffin showed me his stake that he had placed there, with a card on it, on which card there was a notice written, that he claimed the land as his homestead."

One, R. S. Plunkett testified to a conversation with Giffin, in which he told witness that he could have gotten Fossett's claim if he had wanted it, but that he rode right on past that, and went about three miles east of town, and couldn't see anything he wanted, and he came back on Uncle John's Creek and settled.

Kingfisher is in the north part of section 15; Fossett's entry was for the NW. $\frac{1}{4}$ of said section; See *Kingfisher Townsite v. Fossett* (14 L. D., 13) the tract in controversy joins on the east, but is south of Kingfisher.

Hurt is corroborated as to attempting to plow on the 23d; the plowing was of no value, but it marked the land enough to show that it was taken; this, however, was after Giffin's entry. He is also corroborated as to riding a brown horse.

Counsel for Giffin assert that an entry is entitled to the presumption of validity, and that the burden of showing that it is invalid is on the attacking party. This is certainly a very sound principle, and a safe rule to follow. They further claim that Hurt must show a valid settlement on the land prior to Giffin's entry, or his (Giffin's) entry must remain intact. This is also a sound proposition, and Hurt's settlement must be such as would initiate a homestead right.

Counsel have gone at length into what constitutes a settlement, and have cited cases showing where the Department has held that "setting

up a board" with notice on it, that the claim was taken, was not sufficient, and that digging a few post holes in a "gully" on a tract of land, and laying fifteen stones in the form of a house foundation was not sufficient to make a settlement right.

In *Thompson v. Jacobson* (2 L. D., 620), cited, "The testimony shows that Thompson was a visitor at his brother's house, on land near by, (the tract in dispute) in December, 1879, and then erected a board upon the tract filed upon, (by Jacobson) stating thereon his claim to it, and, without any other act indicative of settlement, returned to his home in Iowa." In his absence the land was filed upon; when he returned to Dakota, he and his family went to his brother's house, then they moved into a house his brother had built, where he remained a few days "looking for a tract to file upon". His brother had filed for him on the tract upon which the house was built; this he sold for \$45, and then went to the tract upon which he had set up the board, and claimed it, but it was held that his acts were not sufficient to make a valid settlement.

In the other case cited, *Davis v. Davidson* (8 L. D., 417), it appears that Davis had a filing on a tract of land, had lived on it about three years, and had quite expensive improvements thereon,—a good house, granary, sheds, fencing, and forty acres in cultivation, but he had failed to make his proof within thirty-three months. One, Emerson, with whom Davidson lived, told him that the claim could be "jumped".

These men went at dusk one evening, and in a "gully" on the land, they dug eight post holes, about eight inches deep, set up two posts, laid fifteen rocks, some small and some large, in a rectangular form, and went away. The Department held that Davidson acquired no rights thereby.

The settlement of Hurt was very different from the cases cited. Counsel for Giffin speak of settlements made in Oklahoma, and appear to realize the peculiar conditions of the opening of the Territory, and the difficulties that surrounded the settlers, but they claim that there was no new law or new regulations made for it, and they insist that Hurt be held strictly to the rulings heretofore made, and that by these, he had no settlement on the land on the 22d of April, 1889. They say substantially, that setting up two stakes with cards on them, with a mound around one, running one line and fixing a corner of the land, and sleeping on the tract, were not such acts as would initiate a homestead right, yet their client, who is a land lawyer, and familiar with the conditions that confronted the settlers in Oklahoma, and what was considered a settlement among the people there, claims that putting up a shingle, with his claim inscribed thereon, was a sufficient act of settlement.

It is a notorious fact, that in the great race for homes in the Territory, he who first reached a tract and *staked* it, was regarded as the prior settler, and as eager as men were to secure homes, this kind of settlement was generally respected by the honest people who rushed

into the Territory, for as a matter of fact, to stake a claim, or dig a hole, or put up a wagon sheet or tent, was about all that the great majority of the settlers could accomplish in the afternoon of the 22d of April, 1889, circumstanced as they were, and very many settlements have been held valid in Oklahoma, that were no better indicated, fixed and determined than was the settlement of Hurt. This settlement has been diligently followed up, until it has ripened into a good home, good faith being manifest at all times.

Had it not been for Giffin's interference, he would have had his filing on the land, and every act would have related back to the moment he went upon the land and staked it, intending to make it his home.

Taking all the evidence in the case into consideration, I am led to seriously doubt Giffin's statement about the shingle. What he said to Cunningham was incompetent, but it went in to aid in filling the volume, and when Cunningham came on the stand, he did not corroborate the "shingle" story, but says that he saw a *stake with a card on it, and writing on the card*, which was evidently the stake set up by Hurt, or one of the other three men who staked the claim that afternoon; besides, if Giffin passed Fosset's claim, and rode two or three miles east of town, it would be long after one o'clock before he could reach the claim in dispute. But even if he had stuck the shingle as he says, it was a no better act of settlement than was the stake and card of Hurt, and leaving it, and going on to section 22 and making equally as good a settlement there, was an abandonment of the settlement on section 14, which fact is supported by the preparation of papers for the NW. $\frac{1}{4}$ of section 22, and his conduct at the land office.

I am forced, from the evidence in the case, to find that Hurt was not only the prior settler, but taking all the facts, and the surrounding circumstances, together with his subsequent conduct up to the initiation of the contest, I find also that Hurt had a valid settlement on the land on April 22, 1889, and that he was, in color of law, in possession of the claim when Giffin's entry was made.

This disposes of the case. There are twenty assignments of error, each of which has been fully considered, but I deem it unnecessary to discuss them in detail. The motion for rehearing was properly overruled, as it was clearly shown that the affidavits in support of it, were secured by false statements and trickery. Hurt did right in filing affidavit of contest instead of taking an appeal, which could avail him nothing. The affidavit was filed the same day that Hurt was notified of the rejection of his application, and was therefore in time. The affidavit against Giffin's entry was corroborated by two witnesses. The imperfect application, while pending, unacted upon, preserved Hurt's rights. See *Banks v. Smith* (2 L. D., 44); also *State of California v. Sevoy* (9 L. D., 139).

Giffin made entry for the land, knowing of Hurt's settlement, and the equities of the case are all with Hurt, and the law fairly construed,

gives him the land as prior settler. Your decision is therefore affirmed, the entry of Giffin will be canceled, and Hurt will be allowed to make entry for the land.

SOLDIERS' ADDITIONAL ENTRY—CONFIRMATION.

QUINCY A. SHAW.

A soldier's additional homestead entry based on an invalid certificate of right is confirmed under the body of section 7, act of March 3, 1891, if otherwise within the terms of said section.

The act of March 3, 1893, conferring the right of purchase upon transferees holding under invalid certificates of the additional homestead right, does not restrict the confirmatory operation of section 7, act of March 3, 1891, but provides for a class of cases not confirmed by that act.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 11, 1893.

On the 25th day of May, 1882, James McReynolds applied at the land office at Fargo, Dakota, to make homestead entry for the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 8, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 32, T. 146 N., R. 58 W., as additional to his original homestead, which he entered at Springfield, Missouri, September 13, 1867.

He presented a certificate, issued by your office on the 24th of July, 1880, in which it was certified that he was entitled to make a new additional homestead entry of not exceeding eighty acres, as prescribed in section 2306, Revised Statutes of the United States.

The local officers thereupon allowed his application and issued to him final certificate and receipt number 1003, in which it was stated that "on presentation of this certificate to the Commissioner of the General Land Office, the said James McReynolds shall be entitled to a patent for the tract of land above described."

On the 20th of April, 1891, you held this entry for cancellation for illegality, because "McReynolds had exhausted all his rights under the homestead law before this entry was made."

On the 8th of June, 1891, the local officers transmitted to your office a motion made by the attorneys for Quincy A. Shaw, who was shown to be the present owner of the tract, for a review of your decision of April 20, and the patenting of the entry under the act of March 3, 1891, which motion was denied by you on the 18th of July.

An appeal from your decisions of April 20, and of July 18, 1891, brings the case to this Department.

In your decisions you state that the entry made by McReynolds at Springfield, Missouri, on the 13th of September, 1867, for eighty acres was patented on the 20th of August, 1873. You also state that he made an entry on the 10th of July, 1875, at Duluth, Minnesota, for eighty acres, which was patented on the 23d of November, 1875, and one for a like quantity of land at Detroit, Michigan, on the 10th of June,

1878, which was canceled for conflict with a prior entry, on the 24th of July, 1880, the day on which you issued to him a certificate, stating that he was "entitled to make a new additional homestead entry of not exceeding eighty acres."

I am clearly of the opinion that the local officers were justified in recognizing and in giving full force and effect to your certificate of July 24, 1880. It was issued under the broad seal of the "United States General Land Office," and bore the signature of the Commissioner of that office. Eleven years after the issuance of that certificate, and nearly ten years after a final entry had been made thereunder, you state that in issuing it a record in your office was "apparently overlooked."

Section 7 of the act of March 3, 1891 (26 Stat., 1095), made provisions for the protection of *bona fide* purchasers or incumbrancers of lands covered by such final entries, in cases where the purchase or incumbrance was made after final certificate and prior to March 1, 1888, "unless upon an investigation by a government agent fraud on the part of the purchaser has been found."

The land in question passed through several hands after final certificate and prior to the first of March, 1888, before it became the property of Shaw, at one time being incumbered with a mortgage for sixty thousand dollars. According to the abstract which forms part of the record of the case, Shaw derived title to the lands through a sheriff's deed, the consideration named therein being eighty-seven thousand seven hundred dollars. Neither Shaw nor any of the owners of the land after it passed out of the possession of McReynolds, is charged with fraud. These facts show *prima facie* that the case has all the elements required to bring it within the provisions of section 7, of the act of March 3, 1891. That section made no provisions for punishing "*bona fide* purchasers or incumbrancers" for frauds perpetrated by the entryman, nor for mistakes made in the Land Office. In fact in the case of Joseph S. Taylor (12 L. D., 444), it was distinctly held that fraud on the part of the entryman would not defeat the confirmatory provisions of said section, where no fraud on the part of the purchaser was found. The same rule has been followed by the Department in all cases presenting similar questions.

It follows, therefore, that the entry in question comes clearly within the provisions of section seven of the act of 1891, and is confirmed thereby.

On the 3d of March, 1893, Congress made provisions for entries similar in character to the one in the case at bar, but which might not, perhaps, come within the provisions of the statute of 1891. In an act "making appropriations for sundry civil expenses of the Government, for the fiscal year ending June thirtieth, eighteen hundred and ninety-four, and for other purposes" (27 Stat., 593), it was provided:

That where soldier's additional homestead entries have been made or initiated upon certificate of the Commissioner of the General Land Office of the right to make

such entry, and there is no adverse claimant, and such certificate is found erroneous or invalid for any cause, the purchaser thereunder, on making proof of such purchase, may perfect his title by payment of the government price for the land; but no person shall be permitted to acquire more than one hundred and sixty acres of public land through the location of any such certificate.

While that provision could be applied to entries like the one under consideration, I am of the opinion that it was not intended, by its passage, to restrict in any manner the force and effect of section seven of the act of March 3, 1891, but rather to provide for a class of cases not confirmed by that act. It therefore allows the purchaser of land, entered upon erroneous or invalid certificates, to perfect title to the same, by proving the purchase, and paying the government price therefor, without requiring that the purchase should have been made prior to March 1, 1888.

The decisions appealed from are reversed, and upon proof required by circular of instructions of May 8, 1891, (12 L. D., 450), being furnished to your office within ninety days after service of notice of this decision upon said transferee, patent will issue for the land, as provided in said act of March 3, 1891.

SOLDIERS' ADDITIONAL HOMESTEAD-CONFIRMATION.

CARROLL SALSBERY.

A soldiers' additional homestead entry, allowed on a certificate of right issued on account of service in the Missouri Home Guards, is confirmed by the proviso to section 7, act of March 3, 1891, if otherwise within the terms of said section.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 11, 1893.

On February 20, 1872, Carroll Salsberry made homestead entry for the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 6 and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of Sec. 8 T. 39 N. R. 18 W., containing eighty acres at the local land office at Boonville, Mo., upon which he received a patent in 1884.

On June 2, 1879, he made a soldiers' additional homestead entry for the S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of Sec. 20, T. 15 N. R. 41 E., Walla Walla, Washington. His right to make this entry was based on service in the Missouri Home Guards and from a report made by the Assistant Adjutant General, it is seen that according to the report of the Hawkins Taylor commission, Salsberry was enrolled August 15, 1861, at Camden Co., in Co. "A" Osage Co. Mo., Home Guards and discharged December 20, 1861.

On August 15, 1878, he applied to you for a certification of his right to make an additional entry, and with all the facts before you and after considering the application, on November 11, 1878, in accordance with official circular of May 17, 1877 (4 C. L. O., 37), you certified that he was "entitled to an additional homestead entry of not exceeding

eighty acres as provided in Section 2306 Revised Statutes of the United States."

On March 9, 1891, you held the entry for cancellation as illegal being based upon service in the Missouri Home Guards the members of which organization you held are not entitled to additional entries, citing *Smith Hatfield et al.* (6 L. D., 557) and *Chauncey Carpenter* (7 L. D., 236).

I am of the opinion that the case is within the purview of the seventh section of the act of March 3, 1891 (26 Stat., 1095). The proviso to said section provides that:

After the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture desert land, or pre-emption laws or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

The entry in question was made on June 2, 1879, at that time the rules of your office endorsed by the Department permitted such entries to be made; in fact on November 11, 1878, about six months before the entry was made, you solemnly certified that he had a right to make the entry; it was made and has been allowed to stand all these years and until March 9, 1891, when you held it for cancellation.

More than two years have elapsed since the issuance of the receiver's receipt on the entry in question and there was not, on March 3, 1891, when the act was approved any pending contest or protest against the validity of said entry, said entry is therefore confirmed under the proviso to said section, and for this reason your judgment is reversed. You will issue a patent for the land included in said entry.

CANCELLATION—SETTLEMENT—FINAL PROOF PROCEEDINGS.

LOUGH *v.* OGDEN ET AL.

A judgment of cancellation takes effect as of the date rendered, and the land released thereby from appropriation, becomes subject to entry as of such date, without regard to the time when such judgment is noted of record in the local office.

No rights are secured as against the government by settlement on land withdrawn from entry, but, as between two claimants for such land, priority of settlement may be considered.

A transferee takes no greater interest in the land than is possessed by the original entryman.

Final pre-emption certificate should not issue during the publication of notice, by an adverse claimant, of intention to submit proof under the pre-emption law.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 11, 1893.

The land involved in this controversy is the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 15, T. 25 N., R. 2 E., Seattle land district, Washington.

On the 13th of December, 1889, Samuel H. Lough filed his pre-emption declaratory statement for the land, alleging settlement on the 22d of November, of that year.

On the 16th of December, 1889, James F. Ogden filed his pre-emption declaratory statement for the same land, alleging settlement on the 24th of November, 1889. He submitted final proof, and received final certificate, on the 13th of September, 1890. No special notice of Ogden's intention to submit final proof was given to Lough, and he was not aware that such proof was to be made until after it had been submitted.

Lough gave notice on the 5th of June, 1890, of his intention to submit final proof on the 25th of September, of that year, and publication was duly made, specially citing Ogden.

Upon learning that Ogden had already submitted final proof, Lough applied for a hearing, to determine the respective rights of the parties, alleging that his settlement was prior to that of Ogden, that his residence had been continuous, that his improvements were valuable, and that he never received notice of Ogden's intention to make final proof.

Hearing was appointed, and was attended by Lough and his witnesses, and by Frank P. Ray, transferee of Ogden, with his witnesses.

The local officers, on the 15th of July, 1891, rendered a decision in favor of Ogden, which was reversed by you on the 21st of May, 1892. An appeal from your judgment brings the case to the Department.

The land in question had been settled upon by Miss Lucretia H. Hiscock, on the 4th of February, 1884. She filed her pre-emption declaratory statement therefor on the 6th of that month, and made final proof, and received final certificate, on the 6th of April, 1885. Her entry was attacked by the government, on the 12th of July, 1886, for non compliance with law in the matter of residence, etc., and was canceled by your decision of December 5, 1889. The fact of such cancellation was entered upon the records in the local office on the 13th of December, 1889, and at a later hour in that day, the pre-emption declaratory statement of Lough for the land was accepted and placed on file.

While the government's proceedings against the entry of Miss Hiscock were pending, Ogden offered his pre-emption declaratory statement for the land, which was refused. He appealed from the action of the local officers, and you affirmed their decision. Your judgment became final, on account of no appeal being taken therefrom.

In Ogden's final proof, which was introduced in evidence at the hearing, by Lough, he swore that he first made settlement on the land on the 24th of November, 1889, and first established his actual residence thereon on the 13th of December, 1889. He further made oath that his first act of settlement was to build a cabin; that there was already a shake cabin on the claim, some ditching and some road work, and that he did not purchase these improvements. He placed the value of his improvements at \$350.

He was not present at the hearing, but there was offered in evidence a paper executed by Miss Hiscock and himself, bearing date the 7th of December, 1889, in which Miss Hiscock granted to him permission to occupy her pre-emption claim and the improvements thereon, and gave him power of attorney to protect the claim until her entry should be finally canceled, and waived all her rights to make homestead entry for the land. In consideration of this agreement on her part, Ogden agreed to give her his note for \$259.35, payable in six months.

It was admitted, as part of the evidence in the case, that on the 19th of December, 1890, James F. Ogden transferred his interest in the land in contest to Frank P. Ray, by a warrantee deed (except as against a mortgage for \$500), expressing a consideration of \$4500.

It will be observed that the agreement between Miss Hiscock and Ogden was made two days after her entry had been canceled by you, and that his conveyance to Ray was while the contest against his claim to the land was pending.

On the part of Lough the testimony showed that he went on the land on the 22d of November, 1889; that he had the lines of the tract run by a surveyor that day, and with the aid of H. F. Richards, he cleared off thirty feet square, chopped down some trees, cut some logs and notched them, and put down the foundation for a house. He then went away for supplies, returning on the 30th of November. He slept on his claim that night, and the next day resumed the work of building his house, upon which he was engaged until the 10th of that month, when he went to Seattle to file his declaratory statement for the land.

Without going into any details as to the residence and improvements of the parties upon the land, after their first acts of settlement, I find that both Lough and Ogden complied with the requirements of the pre-emption laws in those respects, up to the time that each submitted final proof. That of Ogden was submitted on the 13th of September, 1890, as already stated, and that of Lough on the 25th of the same month, which was suspended pending the final disposition of this contest.

After Ogden received his final certificate he gave to "The American Mortgage Company of Scotland, limited," a mortgage for \$525 upon the land, as security for a loan to him of that amount, and said company appeals to the Department from your judgment in the case. The company insists that it should be held that Ogden's settlement should date from August, 1889, when he presented his first pre-emption declaratory statement for the land, which would give him a prior and better right thereto than could be claimed for Lough, who made no settlement thereon until November 22, 1889.

This position certainly cannot be maintained, in view of the fact that Ogden allowed your decision to become final, which held that his application of August, 1889, to file for the land, was properly rejected, and in view of the further fact that in the final proof submitted by him on the 13th of September, 1890, he made oath that his first settlement upon the

land was made on the 24th of November, 1889, and that he first established his residence thereon, on the 13th of December, of that year.

The counsel for Ray insist that it should be held that any settlement made upon the land, by either Lough or Ogden, prior to the cancellation of the entry of Miss Hiscock, was illegal; that they were in fact, mere trespassers, and could gain no rights by their acts of trespass. It is then claimed that the entry of Hiscock was not canceled on the records of the local office until the 13th of December, 1890, and that the proof shows that upon that day Ogden was at work upon the land in question, while Lough was in the city of Seattle, filing his pre-emption declaratory statement therefor.

The trouble with this position is, that the Department has repeatedly held that a judgment of cancellation takes effect as of the date rendered, and the land released thereby from appropriation, becomes subject to entry as of such date; without regard to the time when such judgment is noted of record in the local office. *Perrott v. Connick* (13 L. D., 598). In that case it was said:

The minuting of the fact that such judgment had been rendered, upon the record book in the local office, was the mere ministerial act of the officer charged with the duty, and formed no part of the judgment, and neither established nor limited any rights.

In the case at bar, the entry of Miss Hiscock was canceled by your judgment of December 5, 1889, and the proof shows that on that day Lough was at work building his house upon the land in question. The position taken by the counsel for Ray, therefore, does not help their client, as the judgment of cancellation took effect on the 5th, instead of the 13th, of December, 1889. It was held in *Pool v. Moloughney* (11 L. D., 197), that a settlement claim on land covered by the entry of another, attaches instantly on the cancellation of such entry.

The case last cited also held that no rights are secured as against the government by settlement on land withdrawn from entry, but, as between two claimants for such land, priority of settlement may be considered. The same doctrine was repeated in *Hall v. Levy*, on page 284, of the same volume. The settlement of Lough upon the land in question, was two days prior to that of Ogden, according to all the evidence in the case. His rights in the land are, therefore, superior to those of Ogden.

A transferee takes no greater interest in the land than is possessed by the original entryman. *A. A. Joline* (5 L. D., 589); *Charles W. McKallor* (9 L. D., 580); *James Ross* (11 L. D., 623). In the recent case of *Johnson, et al. v. McKeurley* (16 L. D., 152), this question was discussed, and on page 156 it was said:

After final certificate, McKeurley had a right to sell the land, but of course the purchaser took no greater interest therein than the entryman possessed. The act of March 3, 1891, (26 Stat., 1095) afforded protection to all purchasers or incumbrancers after final certificate, in all cases where the purchase or incumbrance was made prior to the 1st of March, 1888. That act, however, affords no relief to Denny, and under

the rulings of the Department, he must defend the entry of McKeurley until patent is secured.

Ray, and the American Mortgage Company, limited, in the case at bar, occupy no better position than did Denny, in the case quoted from. The deed of the one, and the mortgage of the other, were taken after final certificate, and also after the 1st of March, 1888. Both were also taken after a hearing had been directed in this contest.

The local officers were in fault in issuing final certificate to Ogden, while the notice of Lough of his intention to submit final proof was being published. Still the transferee and the mortgagee were in fault, in not exercising more caution and care before parting with their money, and they must seek relief in their remedy at law, as the Department cannot afford it to them in this action. The decision appealed from is affirmed.

OKLAHOMA LANDS—SETTLEMENT RIGHTS.

HAWKINS v. COVEY.

The statutory disqualification imposed upon persons entering the territory of Oklahoma prior to the time fixed therefor extends to one who thus enters said territory for the purpose of securing information that would give him an advantage over other applicants, though he subsequently returns to the "line" and there awaits the signal for entrance, and ultimately does not settle on the tract first selected.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 11, 1893.

This record presents the appeal of Robert Covey from your decision dated March 23, 1892, in the case of Elijah C. Hawkins v. said Covey, involving the NW. $\frac{1}{4}$, Sec. 30, T. 18 N. R. 1 W., Guthrie, Oklahoma.

You affirm the judgment of the local officers sustaining Hawkins' contest initiated October 1, 1889, against said Covey's homestead entry made April 24, 1889, for the said tract. The contest is based upon the allegation that "Covey is not qualified to lawfully claim and hold said tract for that said Covey actually entered upon and occupied the lands referred to in the President's proclamation of March 23, 1889, prior to 12 o'clock noon, April 22, 1889, in violation thereof and in violation of law."

The facts are sufficiently stated in your decision. Covey's purpose in going into the Territory on the day before it was opened to settlement was undoubtedly to obtain information that would give him an advantage over others who likewise contemplated entry. Notwithstanding, therefore, the fact that he returned to "the line" and remained there until the signal opening the lands to settlement, and the further fact that he did not settle upon the tract which he first selected, he was,

as you have well held, disqualified from making entry of the land in question in that he came within the inhibition contained in Sec. 13 of the act of March 2, 1889, (25 Stat., 1005), that

until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto.

Your judgment holding Covey's entry for cancellation is accordingly hereby affirmed. *Smith v. Townsend* (148 U. S., 490).

HOMESTEAD CONTEST—RESIDENCE—SETTLEMENT.

HART *v.* McHUGH.

A declaration of residence at a specified place, for the purpose of voting there, precludes a subsequent claim of residence, at the same time, at another place in order to secure title to a tract under the homestead law.

Acts of settlement induced by knowledge of an impending contest can not be accepted as in *bona fide* compliance with the requirements of the homestead law.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 16, 1893.

On the 1st day of October, 1889, Barney McHugh made homestead entry in the land office of Spokane Falls, Washington, upon the SW. $\frac{1}{4}$ of Sec. 24, T. 27 N., R. 32 E., W. M.

The plaintiff, Adelbert Hart, initiated contest against the entry of defendant on the 4th of April, 1891, alleging abandonment, and upon this issue the case was tried, and judgment in favor of the plaintiff was rendered by the local officers on the 24th of July, 1891.

From this decision an appeal was taken to the Commissioner of the General Land Office, who, on the 11th of May, 1892, rendered a decision reversing the judgment of the local officers, and the case is now before this Department on appeal.

It appears from the record that there had been a prior contest initiated against the defendant's homestead entry by one August Von Behren, on the 10th of April, 1890, and that up to that date, more than six months having elapsed since the entry of McHugh, he had made no settlement or improvements upon the tract involved. Soon after defendant received notice of this contest he went upon the land and built a house, and had about ten acres plowed, and finally compromised with Von Behren, paying him twenty-five dollars to withdraw his contest.

During the year 1890, defendant visited said land three or four times, spending in all some fifteen or twenty days there. From about the 2d of December he was again absent until the 8th day of April, 1891, just one day before he received notice of the contest now under consideration, when he went again upon the land and began a settlement, carrying posts and wire to construct a fence.

It is a coincidence worthy of note that contest was twice initiated against defendant's homestead entry, and that he twice began improvements upon his land, each time just after the filing of contest.

The record discloses the further fact that on the 10th of February, 1891, McHugh registered as a voter at Spokane, at which time he declared his residence to be at 406 E. Riverside Avenue, in that city, some distance away from the homestead tract.

There is no provision in the homestead laws whereby a man may solemnly declare his residence at one place for the purpose of voting, and at another place for the purpose of acquiring title to land. McHugh is bound by his solemn declaration, fixing his residence at Spokane, and is estopped from setting up a residence elsewhere at that time.

It is true, however, that notwithstanding the fact that Spokane was the legal residence of McHugh on the 10th of February, 1891, even up to the 8th of April thereafter, still if, on the last mentioned day, he established his residence on the land in dispute, without any knowledge or intimation of the contest which had been filed on the 4th of April, he was in time to cure his laches, but, in view of all the facts disclosed by the record, I can not resist the conclusion that it was the contest which caused his appearance upon the land on the 8th of April, 1891, and not a *bona fide* intention of establishing a permanent residence thereon.

I do not think that the defendant has complied with the requirements of the homestead laws.

Said decision is therefore reversed.

PRACTICE—AFFIDAVIT OF CONTEST.

KEYE v. LABINE.

An affidavit of contest should set forth a definite charge which, if proven, will warrant cancellation of the entry in question.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 16, 1893.

I have considered the appeal of Frederick Keye from your decision of April 18, 1892, dismissing his contest against the timber culture entry of Eugene Labine for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and lots 1 and 2, of Sec. 30, T. 157 N., R. 47 W., Crookston, Minnesota.

On the day of trial before the local officers, counsel for claimant moved to dismiss the contest for the following reasons.

First, that the affidavit of contest filed in this case does not state a cause of action against the entry of claimant.

Second, for the reason that said affidavit does not allege that claimant is in default.

Third, for the reason that said affidavit alleges conclusions of law, and not issuable facts.

Fourth, for the reason that the claimant may have fully complied with all the requirements of the timber culture law, so far as any non-compliance therewith is contained in the said affidavit.

The local officers denied the motion, without assigning any reason for their action. The charge in the affidavit of contest filed is as follows: "Eugene Labine failed to plant, and did not plant, or cause to be planted, any trees on said lands, according to law."

And it was made very soon after the expiration of the third year from date of entry.

The timber culture law requires that trees, tree seeds, or timber cuttings be planted during the third year from date of entry. It follows that an entryman may fail to plant trees during the third year from date of entry, yet by reason of planting tree seeds or timber cuttings during the same time he may comply with the requirements of the law. An entryman, therefore, should not be forced to the expense of a trial on a charge so indefinite as the one made in this case, as, admitting that the charge is true, it would not justify the cancellation of the entry.

The motion to dismiss should have been granted.

The evidence submitted at the trial related to the planting of tree seeds during the third year of the entry, and the case was disposed of upon its merits, as shown by the evidence submitted.

The local officers found that the entryman had complied with the law, and recommended that the contest be dismissed, and you approved their action.

In my opinion, your decision is justified by the evidence and the same is affirmed.

TIMBER CULTURE CONTEST—BREAKING.

JOY *v.* BIERLY.

A timber culture entryman may properly claim credit for breaking during the first year of his entry, though done by an adverse claimant without the knowledge or consent of the entryman.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 16, 1893.

On the 10th of July, 1889, Greene W. Bierly made timber culture entry for the SW. $\frac{1}{4}$ of Sec. 14, T. 12 S., R. 17 W., Wa-Keeney land district, Kansas, and on the 12th of July, 1890, Gideon C. Joy filed an affidavit of contest against the same, alleging that Bierly had failed to plow or break five acres on said claim, or cause the same to be done, during the first year after making his entry, and that such failure still existed.

Prior to the entry of Bierly, John W. Grieb had made a similar entry for the land, which he relinquished on the 10th of July, 1889. Although

his relinquishment was that day filed in the local office, the fact was not noted on the tract book until December 9, 1889. His entry remaining on the record, it was contested by William H. Schechler on the 7th of October, 1889, and a hearing appointed for December 9, 1889.

The case was dismissed on the day appointed for the hearing, for the reason that a relinquishment of the entry had been filed prior to the initiation of said contest. From this action by the local officers Schechler appealed, and you dismissed his appeal on the 15th of February, 1890. He appealed from your decision to the Department.

Hearing in the case of Joy against Bierly was appointed for the 8th of September, 1890. On that day the counsel for the claimant moved to dismiss the case, on the ground that an appeal was then pending in Schechler against Grieb, in relation to the same land.

The same attorney appeared for both Schechler and Joy, and he thereupon dismissed the former's appeal, and the case of Joy against Bierly went to trial. On the 22d of October, 1890, the local officers rendered their decision in the case, dismissing the contest of Joy. You affirmed their decision on the 1st of March, 1892, and an appeal from your action brings the case to the Department.

The evidence shows that the entryman did no plowing or breaking on the land during the first year after his entry. He employed a man to break ten acres, but the work had not been performed at the time contest was initiated, which was two days after the expiration of the first year after entry. It was shown, however, that in the month of February, 1890, William H. Schechler, who was at that time an adverse claimant for the land, entered thereon and plowed something over five acres of ground, without the knowledge or consent of Bierly.

In his appeal to the Department, the contestant earnestly urges that you erred in giving the entryman credit for this breaking. I find no error in such action. The timber culture law does not require the breaking to be done by the claimant in person, and he may therefore adopt as his own, the breaking done by another and abandoned. *Flemington v. Eddy* (3 L. D., 482). The object of the timber culture law is to encourage the growth of timber, and this is accomplished if the proper work is performed, whether it be done by the entryman, his agent, or some other person. If the work specified for each year is performed, and at the time for making final proof, there is growing upon the land the required number of thrifty trees, the government will issue final certificate, and in due time, patent for the land, without considering the question whether the entryman is, or is not, indebted to the person who performed the labor necessary to produce the trees.

In the case at bar, the testimony fails to show that the required number of acres were not broken during the first year. On the contrary, it shows that over five acres of the ground were broken within that time, and in a condition to be utilized for timber-growing purposes. Such being the case, it matters not when, or by whom, such breaking was done. *Davis v. Monger* (13 L. D., 304), and cases therein cited.

Under these circumstances, I think the contest was properly dismissed, and the decision appealed from is accordingly affirmed.

COLLUSIVE CONTEST—RELINQUISHMENT.

KITCH *v.* GRIFFIN ET AL.

A preference right of entry can not be acquired through a fraudulent and collusive contest.

The purchaser of a relinquishment does not secure a preferred right to enter the land covered thereby.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 17, 1893.

On the 13th of February, 1889, Millard H. Griffin made timber culture entry for the SW. $\frac{1}{4}$ of Sec. 3, T. 14 N., R. 22 W., North Platte land district, Nebraska.

On the 10th of May, 1890, an affidavit of contest was filed against said entry by Eli Kitch, who alleged that Griffin made his entry for speculation, and not for his own use and benefit, and that he had executed a relinquishment of said entry, which was then held by Britton and Moore, at Callaway, Custer county, Nebraska, and he then neither had, nor claimed any interest in said land.

A hearing was appointed for July 8, 1890, notice thereof being personally served on Griffin. He made default on that day, and the contestant submitted his evidence, and the hearing was closed. On the following day Charles E. Jones, by his attorney, appeared before the local officers, and presented proof, showing that he had purchased the improvements and possessory rights of Griffin in said land, and had procured his relinquishment of his entry therefor, and asked that the case be opened, and he be allowed an opportunity to be heard. His request was granted, and the contestant was notified that the testimony would be taken before a notary public, at Callaway, Custer county, Nebraska, on the 20th of November, 1890. Both parties appeared at that time and submitted their proofs, which were duly forwarded to the local office, where final hearing was had on the 5th of December, 1890.

After considering such proofs, the local officers rendered a decision in favor of Kitch, which was affirmed by you on the 12th of March, 1892. An appeal by Jones, from your decision, brings the case to the Department.

The facts established by the evidence in this case, are that sometime in April, 1890, Griffin sold his improvements and possessory rights to the land in question, for eight hundred dollars, to be paid in goods from the store of Britton and Moore, at Callaway, Nebraska. A considerable portion of the goods had been delivered prior to April 30, 1890, on

which day he executed a relinquishment of his entry, which was placed in the hands of Yates and Moore, attorneys, to be delivered to Charles E. Jones, when the balance of the goods should be delivered to Griffin. It was expressly agreed that the relinquishment should not be filed until Griffin had received all his goods. He got the last about the 15th of May, 1890, and on the 16th of that month, Jones executed an application, and the usual affidavit to make timber culture entry for the land. He sent the relinquishment, application and affidavit to his attorney, for filing in the land office at North Platte Nebraska. The local officers declined to make the entry, on account of the contest of Kitch, and the attorney declined to file the relinquishment without being allowed to make the entry.

The record also shows that on the 15th of May, 1890, Griffin made an affidavit, in which he stated that he had relinquished all his right and title to the land in question, and agreed not to appear or defend any contest that might be brought against said land subsequent to the date of such relinquishment, as he had sold and disposed of all his right and title to said land.

The notary before whom this affidavit was sworn to testified at the trial that Kitch gave Griffin twenty-five dollars for making this affidavit, and agreeing to make default at the hearing. The same witness testified that after Griffin left the room where the affidavit and payment were made, Kitch said "That was the first time he ever saw a man sell himself for \$25, and that he had no idea he could get him so cheap."

It was also shown that at the time this affidavit was made, Kitch had just returned from North Platte, where he had gone to place a filing on the land, but that he found that he could not file on it, but would have to contest it. He admits paying the money to Griffin, and the persons who were present at the time, testify that they were charged to say nothing about the transaction, which would be likely to give the Callaway parties notice thereof. The answer of the notary to this request was, "I don't blab about business done before me."

Kitch testified that at the time he filed his contest affidavit, he was aware that Griffin had sold his claim to the land, and executed a relinquishment, as charged by him, and that he was induced to believe that it would be cheaper for him to pay Griffin \$25 for his affidavit and agreement to make default at the hearing, than it would to have him appear against him at the trial.

Instead of the original of the relinquishment of Griffin and of the application and affidavit of Jones, certified copies thereof were made part of the record. At the final hearing before the local officers, counsel for Kitch moved to strike out all the testimony on the part of Jones, for the reason that he had failed to show that he had any interest in said tract, and had offered no relinquishment in evidence, but had presented only what purported to be copies of certain agreements, marked

as exhibits and attached to the record. In their decision the local officers said:

We are of the opinion that said Jones has failed to show an interest in the contest, and sustain the motion to strike his testimony out offered after the default. We also find that Griffin was in default at the first hearing, and has failed to in any way appear in this contest, although notified personally.

The evidence shows that Griffin has abandoned and relinquished the claim. But Jones has never presented his relinquishment, or attempted to enter the land. Therefore we are of the opinion that contestant has acted in good faith, and should be allowed to enter the land, and that said T. C. No. 12,664 should be canceled.

In your decision, you say: "I concur with you in your ruling in excluding all the testimony of appellant, Jones, on the ground mentioned in your said decision. The same is affirmed, the entry of Griffin is held for cancellation, and preference right awarded to the contestant."

From all the facts and circumstances of this case, I do not think the contestant is entitled to a preference right to enter the land in controversy. The evidence certainly tends to show that he entered into a corrupt combination with Griffin for the purpose of cheating and defrauding Jones out of the goods which he delivered to Griffin for his rights in the land, and his relinquishment of his entry. By the payment of money, he then induced Griffin to make default at the hearing on his contest, and endeavored to keep the knowledge of such contest from Jones.

I think this renders his contest fraudulent and collusive. It was held in *Parris v. Hunt* (9 L. D., 225), that no rights could be acquired through such a contest, nor would the rights of others be defeated thereby. In my judgment, Kitch is seeking to acquire title to land to which he has no right, and in *Johnson v. Johnson* (4 L. D., 158), it was said that under no circumstances would the Department permit itself knowingly to be made an instrument to further the fraudulent designs of such an individual.

In *Hoyt v. Sullivan* (2 L. D., 283), it was held that if a contest is not properly brought, no cancellation can result therefrom, and consequently no preference rights are acquired thereby. A fraudulent and collusive contest cannot be properly brought, and Kitch therefore secured no rights by his contest in this case.

I think the evidence in the case abundantly showed that Jones had an interest in the tract in controversy. At the hearing before the commissioner appointed to take the testimony, he offered the relinquishment of Griffin, together with his own affidavit and application to enter the land, in evidence, and certified copies thereof were transmitted by said commissioner as part of the record in the case. Because the originals of those papers were not present at the final hearing before the local officers, the counsel for Kitch moved to strike all the evidence submitted by Jones out of the case, and the local officers granted the motion. This was error on their part.

The statement of the local officers that Jones had "never presented his relinquishment, or attempted to enter the land," may be true as to a *formal* presentation and application, but the statement the attorney of Jones, who transacted the business for him, is that when he "first tendered the relinquishment of Griffin to the register and receiver at North Platte, he learned for the first time that Kitch had placed a contest upon the land, against the defendant Griffin." The attorney adds that the local officers refused to permit Jones to file upon said timber claim, and the relinquishment was therefore not filed.

It cannot be claimed that the relinquishment was in any manner the result of the contest of Kitch, as it was executed some time before his contest was initiated, and no evidence was introduced by Kitch to sustain his allegation that "Griffin entered said land for speculation only." While Griffin appears to have been willing to make oath to anything for which he was paid, he did not include that statement in the twenty-five dollar affidavit which he made for Kitch. In that he only swore that he had relinquished the land, and had no further claim or interest in it, and would not appear to defend any contest which might be brought against it.

It can hardly be claimed, therefore, that Kitch established a cause of action against Griffin, which would entitle him to a cancellation of the entry, and a preference right to enter the land, were no other questions involved in the case. In view of the facts of the case, I cannot concur in the findings of the local officers, that "the contestant has acted in good faith." Before he initiated his contest, he knew that Griffin had relinquished his entry; before the day appointed for the hearing, he knew that Griffin had received eight hundred dollars for his rights in the land, and for his relinquishment; he then paid him twenty-five dollars to make default at the hearing, and to aid in keeping the knowledge of the contest from Jones.

I think these acts show very bad faith on the part of Kitch, and that his contest was brought in collusion with the contestee, for the purpose of defeating justice. The decision appealed from is therefore reversed, in so far as it awarded to Kitch a preference right to enter the land.

Neither is Jones entitled to any preference right to enter the land, by virtue of his purchase of the relinquishment of Griffin. *Talbot v. Orton* (15 L. D., 441). His rights in the tract grow out of his purchase of the improvements and possessory rights of Griffin, and are not evidenced by the latter's relinquishment, as the purchase of a relinquishment confers upon the purchaser no title to the land covered thereby. *Gilmore v. Shriner* (9 L. D., 269); *Armstrong v. Miranda* (14 L. D., 133). Had the relinquishment been filed when it was taken to the local office for that purpose by his attorney, the entry of Griffin would then have been canceled. This would have rendered the land subject to the first legal application to enter, and that of Jones should have been received, notwithstanding the contest of Kitch, but subject thereto. Had the local

officers refused to allow his entry, an appeal would have preserved his rights.

While Kitch offered no evidence at the hearing to establish his charge that Griffin entered said land for speculation only, I think the facts and circumstances of the case, as herein recited, show conclusively that it was not made and held by him in good faith, and, therefore, its cancellation is hereby directed.

CONTEST—RELINQUISHMENT—CONTESTANT.

LYDIC v. FROGGE.

A relinquishment filed after the initiation of a contest does not inure to the benefit of the contestant where it is found that it was not filed as the result of the contest.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 17, 1893.

On the 14th of April, 1890, Mitchell B. Frogge filed an affidavit of contest against the timber culture entry of Erastus W. Lamb, made on the 23d of March, 1886, for the NE. $\frac{1}{4}$ of Sec. 34, T. 11 S., R. 23 W., Wa-Keeney land district, Kansas. He alleged that Lamb had sold his interest in the land for \$50, and had executed a relinquishment and delivered the same to a third party.

On the 9th of May, 1890, M. B. Hollister, who had acted as attorney for Lamb in making his entry, and who was acting as attorney for Frogge in contesting it, also filed an affidavit of contest against said entry, the allegations being the same as in Frogge's affidavit.

On the 12th of May, 1890, James R. Lydic filed affidavit of contest, alleging failure on the part of Lamb to comply with the timber culture law, specifying the particulars in which he was in default, and also alleging that Frogge's contest was illegal, for the reason that he was the purchaser of Lamb's relinquishment. On the 19th of the same month he filed his application to make timber culture entry for the land, and affidavits in support of a motion made by him that Frogge and Hollister be required to show cause why their respective contests should not be dismissed for illegality, collusion and fraud.

His motion was granted, and notice was accordingly issued, citing Frogge and Hollister to appear July 17, 1890, and submit testimony concerning the charges made by Lydic in his original and supplemental affidavits.

On the 21st of May, 1890, Frogge and Hollister both appeared at the local office. The former filed Lamb's relinquishment of his timber culture entry, and his own application to make a similar entry for the land. Lamb's entry was thereupon canceled, and the contests of Frogge and Hollister dismissed with their consent. The contest of

Lydic was also dismissed, without notice to him, and the application of Frogge, to make timber culture entry for the land placed of record.

Lydic was notified of these proceedings, and allowed thirty days within which to assert any rights he might claim under the contest filed by him. He did not appeal from the action of the local officers, but on the 20th of June, 1890, filed a motion that he be allowed to support and prove his allegations against the entry of Lamb, comply with the provisions of section two, of the act of May 14, 1890, (21 Stat., 140), and secure the benefits thereof; that the filing of Lamb's relinquishment be adjudged to have been the result of his contest, and that he be allowed to make timber culture entry for the tract.

His motion was granted, so far as the appointment of a hearing was concerned. It took place on the 15th of October, 1890. At the trial Lydic offered no evidence in support of his charges against the entry of Lamb, but submitted the record evidence relating to the several contests to the filing of Lamb's relinquishment, and to his own application to make entry for the land. This record evidence was corroborated by the sworn statement of his attorney, and his case was rested upon such testimony, and upon the presumption that the cancellation of Lamb's entry was the result of his contest against the defendants therein named.

Frogge demurred to the evidence, on several grounds, and moved that the case be dismissed. This motion was not decided by the local officers until the 26th of November, 1890, when they overruled the demurrer and motion, and allowed Frogge thirty days within which to apply for a further hearing, with opportunity to produce evidence in his defense.

Such further hearing took place on the 29th of January, 1891, at which Frogge testified that he first came into possession of Lamb's relinquishment on or about the 20th of May, 1890. That he purchased it from his brother Robert, paying \$500 therefor. That he had no knowledge that Hollister had initiated a contest against Lamb's entry, until he went to file said relinquishment, and that he had no knowledge of having sworn to the matters contained in his contest affidavit, in relation to the relinquishment having been executed for \$50, and being in the hands of a third party.

E. D. Wheeler testified that he procured Lamb's relinquishment, which was executed in January, 1890. There was a written contract in connection with the transaction, which was not then in his possession, or under his control. He sold the relinquishment to Robert R. Frogge, but could not tell who he delivered it to, or whether he sent it to an attorney, or to the defendant.

After the defendant rested, Lydic asked the attorney for Frogge to produce the written agreement testified to by Wheeler. This he refused to do, or to be sworn as a witness in behalf of Lydic. The case was thereupon closed, and on the 20th of February, 1891, the local officers rendered their decision, in which they held that the contest of

Lydic should be dismissed, and the entry of Frogge allowed to remain intact. This decision was affirmed by you on the 18th of March, 1892, and a further appeal brings the case to the Department.

The local officers erred in the course pursued by them on the 21st of May, 1890, when they dismissed the contest of Lydic against the entry of Lamb, without notice. It was proper for them to cancel Lamb's entry upon the filing of his relinquishment, and to dismiss the contests of Frogge and Hollister, upon their requests, but they should not then have dismissed the contest of Lydic, nor allowed Frogge to make entry for the land, in view of the prior and pending application of Lydic. The proper course for the local officers would have been to order a hearing to determine the rights of the respective parties. When they failed to do so, the proper course for Lydic would have been to have appealed from their action.

A relinquishment filed, pending contest, does not defeat the right of the contestant to be heard on the charge as laid by him; and while his preference right is dependent upon his ability to establish said charge, the relinquishment is presumptively the result of the contest, though such presumption may be overcome. *McClellan v. Biggerstaff* (7 L. D., 442); *Webb v. Loughrey, et al.* (9 L. D., 440).

At the time Frogge presented his application to enter the land, accompanied by the relinquishment of Lamb, the contest of Lydic was properly pending. In such a case an application can only be received, subject to the right of the contestant. *Gilmore v. Shriner* (9 L. D., 269).

By failing to appeal from the action of the local officers, in dismissing his contest without notice to him, and in failing to establish his charges against the entry of Lamb, when an opportunity was afforded at his request, Lydic failed to show himself entitled to a preference right to enter the land.

A relinquishment filed after the initiation of a contest, does not inure to the benefit of the contestant, where it is found that it was not filed as the result of the contest.

Lydic made no effort to show that the relinquishment in this case was filed as the result of his contest, but asked that that fact be presumed, and that Frogge be required to overcome the presumption. In support of his position he cited the case of *Brakken v. Dunn, et al.* (9 L. D., 461). The holding in that case was that a relinquishment *made and filed*, pending a contest, is presumed, in the absence of evidence to the contrary, to have been the result of the contest, and therefore inuring to the benefit of the contestant. That case also held that the rights of the contestant are determined by the status of the land when contest is instituted, and his right to proceed against the entry cannot be defeated by a *subsequent* relinquishment. In the case at bar, the relinquishment was made more than four months prior to the contest, and its execution therefore could not have resulted therefrom.

From the circumstances of the case, I think the contest of Lydic had something to do with the filing of Lamb's relinquishment, although the testimony of Frogge was intended to create a different impression. His testimony was in all respects exceedingly unsatisfactory, but in view of the fact that Lydic made no attempt to establish his contest charges of non-compliance with law on the part of Lamb, I am unable to grant him the relief asked for in his appeal to the Department. The conclusion reached in the decision appealed from, is therefore approved.

CONFLICTING SETTLEMENT CLAIMS—AGREEMENT.

WALTERS v. MINTER.

Priority of right may be properly accorded a settler, who, under an agreement with an adverse claimant, goes upon a tract with the knowledge and consent of such claimant.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 17, 1893.

Your letter of November 29, 1892, transmits the appeal of Alfred G. Minter from your decision of April 30, 1892, modifying the decision of the local officers, in the case of William H. Walters against said Minter.

The defendant, Minter, filed pre-emption declaratory statement on the 26th of February, 1890, in the land office of Spokane, Washington, upon the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 31, and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 32, T. 37 N., R. 38 E., W. M., alleging settlement October 4, 1889.

On the 14th of March, 1890, William H. Walters filed homestead entry for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 31, and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lot 2 of Sec. 32, same township, alleging settlement in August, 1889.

On May 17, 1890, plaintiff, Walters, filed protest against the final proof of defendant, Minter.

Minter claims four forty-acre tracts arranged in a line running east and west, and is now living upon that one farthest east, while Walters is now residing upon that one farthest west, the forties in dispute being that one on which Walters lives, and the two forties lying between them.

The issue submitted is prior settlement.

The record in the case is confused and unsatisfactory with reference to some of the facts that might throw light upon the case.

The land in controversy, it appears, had been some time previous to the origin of this litigation withdrawn from entry, in order that certain alleged frauds and defects in the survey might be corrected. Whether such corrections were made does not affirmatively appear, but the lands were again restored to entry in February, 1890.

On and before the month of October, 1889, neither of the parties resided upon the land in controversy. Plaintiff Walters was living in the town of Marcus, and defendant Minter was living in a house which he had built upon a tract of land situated to the north and east, upon what was known to the parties as the "First Devil."

Walters had commenced the building of the house in which Minter now lives, just across the eastern limit of the tract in dispute, upon that forty embodied in the filing of defendant, but not included in the homestead entry of plaintiff.

In his testimony defendant says, that in 1889, while plaintiff was living at Marcus, he (plaintiff) claimed the land upon which defendant was living on the "First Devil," and three times ordered defendant away. This the plaintiff denies. They both agree, however, that in October, 1889, they went with a surveyor for the purpose of locating some of the boundary lines of the land upon which plaintiff intended to make entry. For the guidance of the surveyor, he was furnished with a map of the lands of one Oppenheimer, adjoining that to be surveyed, intending to begin the survey at the southeast corner of the Oppenheimer tract, but, by an unfortunate mistake, they started from the northeast corner of another lot, in consequence of which the work done by the surveyor furnishes very little assistance in arriving at the truth.

Up to this date it will be observed, from an inspection of the record, that neither of the parties had made any settlement upon the land to which they are now seeking title. Plaintiff and defendant differ in their testimony as to the date of the survey—plaintiff fixing it on the 7th and defendant on the 4th of October, 1889.

On that day, however, Minter asserts, and plaintiff denies, that while they were present upon the land, and in view of the tract now claimed by both, as well as the tract located by the survey to the north, they entered into an agreement. By the terms of said agreement, Walters was to take the land to the north of the surveyor's line, and sold to Minter the house in which Minter now lives, and relinquished all claim to the tract in controversy. Minter was to file upon the land upon which the house is located, also upon the land in question.

The record shows further that Minter completed the house at once, and moved into it during that month, abandoning his claim upon the "First Devil," and has lived in said house ever since. Walters soon afterwards moved his house from Marcus to a place which he supposed to be upon his land, but was, in fact, upon the land of Oppenheimer. In November afterwards Walters discovered, for the first time, that the survey which he had made was erroneous, and then moved his house upon the land in controversy, where he has been living ever since.

They went to trial before the local officers upon an issue of fact thus made up, and the defendant won.

If such an agreement was made and entered into between the parties, and defendant, in compliance therewith, went upon the land, with the knowledge and consent of plaintiff, his preference right obtains, notwithstanding the fact that plaintiff was misled by the erroneous survey disclosed by the record. Plaintiff thought, and so did defendant, on the day of their survey, that they were locating a line or lines that would correspond with the government survey of the southern half of the northeast quarter of section 31, and the southern half of the northwest quarter of section 32. In this they were both mistaken, but the local officers have decided that each of them, then and there, selected the tract upon which each would file or enter.

The evidence disclosed by the record seems to me to justify the decision of the local officers, especially in view of the fact that they were in a position to notice any bias or prejudice apparent in the manner and conduct of parties and witnesses.

Your decision is therefore reversed.

ENTRY-ORDER OF CANCELLATION.

WILLIAM A. FOWLER.

An entry, though improperly allowed, should not be canceled without notice to the entryman, and due opportunity given to show cause why such action should not be taken.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 17, 1893.

I have before me the appeal of William A. Fowler from your decision of July 21, 1892, holding for cancellation his homestead entry for the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 24, the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 25, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 26, T. 11 N., R. 11 E., Mt. D. M., Sacramento, California, land district.

It appears from the record that, on April 9, 1892, one Dennis Dailey made homestead entry for the land in controversy; and, on May 5, 1892, Fowler made like entry for it. You held the latter for cancellation on the petition of Dailey, without a hearing, because it was invalid. On October 3, 1892, you wrote to Fowler that his proper course, if his statements as to settlement on the land were true, was to contest the entry of Dailey.

While it is true that the entry of Fowler was improperly allowed by the local officers, yet, it having been made a matter of record, it should not have been held for cancellation, without notice to him, and an opportunity given to show why the same should not be canceled. This course would have brought out the facts, and established the rights of the respective parties to the land.

Such action not having been taken, a hearing must be had upon the affidavit of Fowler, which was filed October 15, 1892. Notice will be given the parties, and each will be allowed to submit proof in support of his claim to the land in question. Fowler's entry will, in the meantime, remain of record.

Your decision is set aside, and you will order a hearing, as indicated, and upon a report of the register and receiver, you will readjudicate the case.

MINING CLAIM—EXPENDITURE.

KIRK ET AL. v. CLARK ET AL.

Work done outside of the boundaries of a claim, for the purpose of facilitating the extraction of mineral therefrom, is as available for holding the claim as though done within the boundaries of the claim itself.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 19, 1893.

I have considered the case of John T. Kirk, *et al. v. Anthony Clark, et al.*, on appeal by the former from your decision of August 16, 1892, dismissing their protest against the issuance of patent to the latter for the Justice Placer mine embracing the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and lots 1 and 2 of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 26, T. 14 N., R. 10 E., M. D. M., Sacramento land district, California.

The record in this case is considerably entangled and confused by divers affidavits and various claims, but on January 29, 1890, the register of the Sacramento land office issued an order, which was substantially, that in obedience to the instructions of the Honorable Commissioner of the General Land Office, by letter "N," of January 20, 1890, a hearing would be held at the Sacramento land office on March 24, 1890, at 10 o'clock, a. m., upon the corroborated affidavit of John T. Kirk against the application of Felix Chappellet and Anthony Clark for patent for the land described, and said Kirk would then be allowed to introduce evidence to show whether or not said Chappellet and Clark, or their grantors, had placed \$500.00 worth of labor and improvements on the said claim, for the purpose of developing it, and extracting minerals therefrom, and Chappellet and Clark would be allowed to offer rebutting evidence to sustain their claim. With this the case proper began.

At this hearing a large volume of testimony was offered, and various plats of surveys were introduced, and upon what appears to have been a careful consideration of the case by the register and receiver, they rendered, on October 12, 1891, a joint opinion, which I find contains a carefully prepared synopsis of the evidence in the case, and they conclude that the protest should be dismissed, and so recommend.

From this action Kirk appealed. You affirmed the action of the local officers, and dismissed the protest, from which his legal representatives (he having died) appealed, but the appeal was in the interest of Douglas, *et al.*

There seems to have been some confusion in the matter of the appeal, by reason of the attorney, who, while he attempted to appeal this case, really took an appeal in another case, involving the "High Rim" placer, but the papers in the case at bar had become mixed with the papers in the "High Rim" case, which was between the same parties, and you found that the appeal filed under contest 971, was not intended as an appeal in that case, but was intended as an appeal in the case of the "Justice" placer, and you considered the case as properly before you.

Counsel for Clark and Chappellet have argued at some length that you erred in this, and that the appeal was so imperfect that you should have dismissed it, instead of taking jurisdiction of the case. There is some merit in the point insisted upon, but as you decided the case in favor of Clark and Chappellet they were not in a position to object to your decision. The appeal to the Department is regularly taken, and I have considered the case on its merits, rather than going back to review your action in sustaining the appeal.

On September 26, 1885, Felix Chappellet and Anthony Clark filed their application No. 1488, for patent for the Justice placer mine, embracing the land described above. They continued in possession of the mine until October 3, 1888, and then, upon due notice, made proof, paid for the land and received final certificate therefor.

On May 8, 1889, John T. Kirk filed a verified and corroborated petition, in which he charged gross fraud in the making of the proof. He alleged that when the proof was made, no mining of any kind whatever had been done upon the land described; he asked that all proceedings in the case be stayed in your office, the case be remanded to the local office, and that he be permitted to offer proof in support of the allegations of his petition, etc.

On January 4, 1890, one, H. C. Douglas filed in the local office an affidavit, averring that he and E. C. Smith and F. Hawkins had located the mining ground embraced in the "Justice" mine, on or about the 14th day of April, 1889, and after describing the land in detail, he avers that they have performed \$100.00 worth of work and labor thereon, and have complied with the mining laws in all particulars. He further avers that the "Mayflower Mining Company", a corporation claiming to have succeeded to the rights of Chappellet and Clark, "are now mining on said 'Justice' mine, and are taking out of the said mine large amounts of gold." He asks that the case be resubmitted at an early day, etc.

Kirk appears to have been acting for Douglas, Smith and Hawkins, but he does not say so, but he filed several affidavits at various times, in corroboration of and emphasizing the allegations of his petition.

Douglas, *et al.* claim to have relocated the "Justice" mine, upon the theory that it was abandoned.

An abstract of title placed in evidence, shows that Chappellet had secured certain mining claims, notably the "Golden Eagle," and that Clark had the "Justice" and some other claims, that they had consolidated their claims for mutual benefit, and by *inter partes* deeds each became the owner of the undivided half of the whole of these mines, and as tenants in common they performed labor and expended money in the development of the consolidated property.

Having driven some tunnels and extended some old ones, and sunk some shafts, not deep nor effective as working shafts they, in September, 1885, entered into an agreement, in writing, (a copy of which is of record) with the "Mayflower Gravel Mining Company," a corporation which owned a mine lying north of the "Justice" and "Golden Eagle" mines, whereby the "Mayflower" Company paid Clark and Chappellet \$6000 for an option on their consolidated mines for one year, and it was to develop the mines by driving a tunnel beginning "in second brushy canoñ at a point not higher up the canoñ than the place selected by the survey made by William Uren." Uren was a deputy U. S. mineral surveyor. The company was, by this agreement, to have the privilege of taking these mines at \$120,000 at any time within one year, the \$6000 to be considered as a payment if the contract was consummated, if not, it was to be forfeited, and in addition thereto, the claimants were to have the benefit of the work done; they were to have the right to the use of the tunnel to explore, work and drain their mines, and they were to have a mill site near the mouth of the tunnel on the south side of brushy canoñ and a sluice way, and the right to work their mine "before the mouth of said tunnel." This clause of the contract appears to have been inserted because the mouth of the tunnel was not on the lands of the claimants and while the "Mayflower" Company might not wish to pay the \$114000 to be paid, and could at any time abandon their work and forfeit the \$6000, the precaution was taken that all that it did do should be so controlled by the claimants that it would inure to the benefit of the "Justice" consolidated.

There was also a clause in the contract to the effect that if, at the end of the first year, the "Mayflower" did not wish to conclude the contract, nor to abandon the tunnel, it should be allowed another year by paying 5 per cent on the \$114000, and paying to claimants one-half of the gross amount of all gold or silver that might be taken from their lands, but if within the second year the "Mayflower" concluded to close the contract, such gold or silver should be credited, as should also the 5 per cent, upon the \$114000 due. The company did not reach "pay gravel" the first year, but renewed the contract, paying the 5 per cent, etc.

Owing to a mining claim, now owned by the "Mayflower," having been patented on a survey made before the government survey of the land, the southern part of section 23 was rendered fractional, and was

cut into lots, and these being within the grant to the Central Pacific Railroad Company, and claimed by it, they were patented to it April 30, 1885, and by it deeded, August 28, 1885, to James Newlands, and by him, on January 27, 1888, deeded to Clark and Chappellet, and by them made a part of the "Justice Consolidated" mine.

The work put on the claim by Chappellet and Clark, and their grantors, is estimated by Engineer Uren, and Browne, U. S. Deputy Mineral Engineer, to have cost about \$2000, and by other expert miners, at a similar amount, but it does not appear to have been of very great value, and other witnesses say that it was not of the value of \$500, as the shafts were not deep enough, nor the tunnels long enough to reach the "ancient river bed," which contained the gold bearing strata of sand and gravel. The claimants made the contract referred to, to secure a tunnel to this bed.

Mr. Browne made a plat of his survey of the "Justice", which is in evidence, and is shown to be substantially correct. It shows tunnel No. 1 as starting on the land in section 23, and running into the "Justice". Tunnel No. 4, run by the "Mayflower" Company, starts in section 23 and bears south of east into the "Justice"; the head of this tunnel is near the north line of section 26, and from this point drifting, is carried several hundred feet into the "Justice", and here is where the gold is being taken out, that Douglas complains of.

There are three shafts sunk on the "Justice" within section 26. Engineer Browne, who is an old experienced miner, as well as mine engineer, said:

Before making a final selection of a point at which to begin permanent work for the working and development of the "ancient channel", it is not only customary, but proper, to sink shallow shafts, and drive short tunnels at or near the points on the claim, or contiguous claims, where the bed rock may be exposed on the surface. By this means, the pitch or incline of the bed rock into the channel can, with reasonable certainty, be ascertained, and data furnished upon which to base an intelligent estimate of the proper depth at which to begin, and the point from where, and the course for a permanent working tunnel into the ground intended to be worked.

From all the evidence, fairly considered, it appears that these claimants had expended over \$500 in doing what expert miners say was the proper and reasonable things to do, and they so fully prospected the claim, that the "Mayflower" Company, a wealthy corporation, were willing to take hold of the work and push it to completion.

Tunnel No. 4, which is the main tunnel, was constructed under the supervision of Chappellet, who was in the employ of the Mayflower Company, and the expense was paid by it. The tunnel is 5585 feet long, and cost about \$140000. It broke through into "pay gravel" at about 5500 feet, on December 11, 1888; the company then, after running into the gravel some distance, began drifting north and south; the gravel is very rich in gold.

Douglas, *et al.* based their relocation upon abandonment by the entrymen, but by their statement, the "Justice" is being worked so

industriously that they asked to have the case hastened in its hearing. The "Mayflower" was the assignee of the entrymen.

Section 2324, Revised Statutes, provides for relocation where the first locator fails to comply with the law, or abandons the claim, but it says "provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure, and before such location."

Douglas seems to have relied upon the fact that the mouth of the tunnel was not on the "Justice", although it is clearly shown by the terms of the contract that it was for the purpose of working this claim, as well as others.

In the case of Mount Diablo Mill and Mining Company *v.* Callison, et al., Circuit Court District of Nevada, (5th Sawyer, 439-457.) It was held that: "Work done outside of the claim, or outside of any claim, if done for the purpose, and as a means of prospecting or developing the claim, as in the case of tunnels, drifts, etc., is as available for holding the claim as if done within the boundaries of the claim itself."

In the case at bar, various tunnels and shafts were dug, but tunnel No. 4, was run for the purpose of *working* the "Justice" mine, and it is successfully working it, and was at the time those proceedings against the issuance of patent were commenced. On this matter of work done off of the claim, outside of its boundaries, where it is made to appear that such improvements were made, or work done to facilitate the extraction of the ore the case of "Emily" Lode (6 L. D., 220) is in point; in this case a number of cases are cited all in line with the above quotation.

I deem it unnecessary to further discuss the case. I do not find that the work done, and money expended, even in the shallow shafts and short tunnels, was done simply to make a pretense, and that they were in fraud of the rights of the government, and I find that much more than \$500 were expended before application for patent was made. I concur with you and the local officers that the protest should be dismissed, and as Douglas, *et al.*, made their location on land already entered which was being worked to its utmost capacity, I find they have no standing in the case. The judgment appealed from is affirmed.

PRACTICE—RULE 114 AMENDED.

Secretary Smith to the Commissioner of the General Land Office, August 19, 1893.

Motions for re-review, or a second reconsideration, of decisions have become unduly burdensome to the business of this department, and, in the interest of repose and the final determination of litigated matters, should be stopped.

To this end, I direct that Rule 114 of Practice be amended by adding thereto as follows—

Motions for a re-review, or a second reconsideration of a decision, shall not be received or filed. But the defeated party, if able, may invite the attention of the Secretary, by a duly verified petition, to important matters of fact or law not theretofore discussed or involved in the case; who, upon consideration thereof, will either recall the case, or send the petition to the files without further action.

PRE-EMPTION—RESIDENCE—TRANSMUTATION.

SMITH v. GRAHAM.

A pre-emptor who has established his residence in good faith does not forfeit his rights thereunder by a temporary absence in the discharge of official duties; nor is the right of transmutation during such absence affected thereby.

The rule that recognizes official duty as an excuse for temporary absence is equally applicable whether the duty is imposed by the appointing power or by election.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 21, 1893.

The land involved in this appeal is the NE. $\frac{1}{4}$, Sec. 14, T. 22 N., R. 1 W., Seattle, Washington, land district.

The record shows that Allen J. Graham made homestead entry for said tract May 6, 1889. The application alleges settlement April 24, 1888, and that it "is made for the purpose of changing my declaratory statement on same described land, No. 11986 to a homestead." On November 7, 1889, W. H. H. Smith filed an affidavit of contest, against the entry, alleging:

That said tract has not been settled upon and cultivated by said party as required by law; that said Graham held said tract from May 1, 1888, to May 6, 1889, as a pre-emption without residing thereon permanently or continuously and therefore had no right and was not entitled to transmute his preemption to a homestead on May 6, 1889.

Hearing was had before the local officers. From the evidence they held that claimant had "not complied with the law regarding residence and improvements," and recommended that his homestead entry be canceled. He appealed and you by letter of March 22, 1892, reversed their decision and held said entry intact subject to future compliance with law. Whereupon Smith prosecutes this appeal, assigning numerous errors, the material ones, however, aside from the objections to your findings of fact, are:—

VI. Error in deciding that Allen J. Graham had not abandoned his pre-emption prior to transmuting the same to a homestead on May 6, 1889; and,

VIII. Error in deciding that the homestead claimant should be excused from residing on the land because of official duties as deputy postmaster at Tacoma.

The evidence shows that Graham settled on said land April 26, 1888; and on May 1, following, filed his pre-emption declaratory statement; that he lived there alone until August of that year when he was joined by his family who resided there continuously till February 24, 1889, when he left taking his family with him to Tacoma. "About March 1," he was appointed assistant postmaster at Tacoma, which position he has since held. He lived, with his family, in the latter place continuously, visiting the land twice before the contest was initiated. In fact there is no controversy as to his residence. It is admitted by the contestant that he resided there as stated, and the claimant does not deny his absence from February 24. The only issue made by the affidavit of contest against the pre-emption claim is as to the residence of the claimant, and under the showing made, I think it must be held that contestant has failed to sustain this charge.

When the claimant went away from the premises he left locked up in his house, all his household effects and tools. It is not shown definitely why he left the land but inasmuch as he accepted the appointment of assistant postmaster a few days thereafter, it is quite probable that he went away for that purpose. He says that it was not his intention to abandon the land, that he is going to return to it in a few weeks. There is some testimony tending to show that he made a contract for some additional improvements and paid for them, but the work was not performed. He also addressed a letter to the receiver dated July 24, 1889, in which he fairly states his case and asks for his decision as to whether his absence under the circumstances will work a forfeiture of his land. So that upon the whole, I can not find that he left the land with the intention of abandoning it.

The question therefore is whether, under these circumstances, a pre-emption filing can be transmuted to a homestead entry. It will be borne in mind that the entryman had been absent from the land in the performance of his official duties, a little over two months, when he changed his filing to a homestead. It is urged by counsel that inasmuch as he did not actually reside upon the land at the time of the change, or at any time as a homestead claimant, that he does not come within the rule that permits a settler to leave his land when called away by official duty, because he did not establish a residence under his homestead entry.

The statute (20 Stat., 113), provides that a person who has made settlement and filed his pre-emption declaration, may change his filing into a homestead, if he continues in good faith to comply with the pre-emption laws until the change is effected. The Department has frequently held that where a *bona fide* settler has established a residence and is afterwards called away by official duty, such absence will not work a forfeiture of his rights. This rule applies to pre-emption rights as well as others. (Cassius C. Hammond, 7 L. D. 88). It therefore follows that at the time he made the transmutation he was, constructively,

a resident upon the land and complying in good faith with the pre-emption laws. If I am right in this proposition, then there can be no objection to the change and whatever rights he had gained by his pre-emption would attach to his homestead.

It is also contended by counsel that the rule excusing the presence of the entryman should not be applied to a deputy or assistant. But I can see no reason why this distinction should be made. It is the official duty that excuses the entryman, and it matters not whether that duty is imposed by the appointing power or by election. (A. E. Flint, 6 L. D., 668; R. T. Heming, id., 307).

Your judgment is therefore affirmed.

SETTLEMENT CLAIM—POSTED NOTICE.

SWEET v. DOYLE ET AL.

Notices, defining the extent of a settlement claim, conspicuously posted on subdivisions thereof outside of the technical quarter section on which the improvements are placed, are as effectual in notifying subsequent settlers of the extent of said claim as improvements placed on the different subdivisions.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 21, 1893.

On December 20, 1890, John Doyle made homestead entry No. 5916 for the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 7, and lots 3 and 5 and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 8, T. 39 N., R. 7 E., Wausau, Wisconsin, and on December 22, following P. J. O'Malley made homestead entry No. 5994 for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 7, same township and range.

Some time thereafter Alvin B. Sweet applied to make a homestead entry for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 7, and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lot 5, Sec. 8, township and range as aforesaid, claiming priority by reason of his settlement on the tract before either of the above entries were made. His claim conflicted with O'Malley's entry as to the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 7, and with Doyle's entry as to lot 5 and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 8.

A trial was had on May 13, 1891, attended by all the interested parties, and after considering the evidence submitted, the register and receiver found in favor of Sweet, and recommended the cancellation of the homestead entries in so far as they embraced the land claimed by him.

Appeals were taken to you, and on April 23, 1892, after considering said case, you modified the finding of the register and receiver and held that although Sweet's settlement was made before the land was entered, no improvements were placed by him on any of the land, except the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 8, where his house was built, and

hence he acquired no right as against the homestead claimants to land outside of the technical quarter section upon which his improvements were placed, citing the case of *Pooler v. Johnson* (13 L. D., 134). You accordingly awarded the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 8 to Sweet.

He has appealed from your judgment to the Department, as have also Doyle and O'Malley; the former complaining that you erred in not awarding him all the land claimed by him, and the others because you did award to him the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 8.

The attorneys for Sweet have filed a motion to consolidate this case with that of *Theodore D. Fay v. Daniel Fitzpatrick and P. J. O'Malley*, Vol. 17, 767, on account of the partial identity of parties and causes of action. Attorneys for the other parties contend that it is useless to consolidate the cases. They have been considered at the same time, but I cannot determine that any advantage will be gained by consolidation, and will therefore enter judgment in this case separately.

It is a well established rule of the Department that the notice given by settlement and improvement extends only to the quarter section as defined by the public surveys. That is, to the technical quarter section upon which the settlement and improvements are made. *L. R. Hall* (5 L. D., 141); *Cooper v. Sanford* (11 L. D., 404); *Pooler v. Johnson* (13 L. D., 134); *Shearer v. Rhone* (13 L. D., 480); *Staples v. Richardson* (16 L. D., 248). But it is held in the first case cited above that notice of the claim of a settler may be given by settlement, by improvements, "or in any competent manner;" and in the case of *Cooper v. Sanford* above cited, it was held that—"it was not a proper interpretation of this ruling to hold that only actual improvements give notice of settlement; Notice given in any competent manner is sufficient." It is held that a settlement made on a quarter section, even though all the improvements made thereon are placed on one quarter thereof will defeat a subsequent homestead entry, because such settlement is constructive notice to all of the settler's claim; but if the settler claims land in more than one quarter section, he must make improvements on each subdivision of the land outside of the quarter section on which he has settled, or he must give sufficient notice that his claim extends outside of the quarter section on which he has settled.

So in the case of *Cooper v. Sanford* (*supra*), actual notice of the extent of a settlement claim was held sufficient.

We come now to a consideration of what kind of a notice aside from settlement or improvements will be sufficient to defeat a subsequent homestead entry. Of course, no sort of a notice would be sufficient in the absence of a settlement on a portion of the tract claimed, but the question to be determined is, what kind of a notice of a settlement claim is required to defeat a subsequent homestead entry.

In the case at bar it is admitted that Sweet made his settlement prior to the homestead entries. His improvements were placed on the

SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 8, but he claimed from the first in addition thereto, lot 5 of said section, and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 7, all in township 39 N., range 7 E.

It is contended that he settled before the land was open to settlement. An examination of the facts and the law of the case, however, has convinced me that his settlement was made after the tracts were open to settlement. It is shown by the evidence that Sweet went upon the land between twelve and one o'clock on the morning of December 20, 1890, for the purpose of taking the land under the homestead law. He took with him lumber, tools, furniture, and provisions, and by the help of others built his house on the land by eight o'clock the next morning, so that it would shelter him. The house was completed and he moved in on January 5, 1891. He says—

I put up one notice on a tree right by the side of the house (which is in section 8), and I put another up on the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of seven, as near as I could to about the middle of the two forties. The house is located on the south west north west of Sec. 9, [8] 39, 7. Q. What did your notices that you put up contain? Ans. They simply stated, give the description of the land and my intention of claiming that as a homestead, and my name signed to it, and the date; this notice described the description of the whole tract.

I am of the opinion that the notices put up, and which, it is shown, were seen by homestead claimants when they first saw the land after entry, were sufficient to take the place of improvements. Notices describing the claimed land, posted in conspicuous places on the tract, would seem to be quite as effectual in notifying others of the extent of the claim as improvements placed on the different subdivisions, such as would or could be placed there during the first period of a settlement claim.

Therefore, your judgment holding that Sweet's claim must be rejected because made for land in different quarter sections, with improvements and settlement all on one quarter, must be reversed, as to such ruling; and since it is admitted that he is a prior settler on the land, and that he is now claiming the same land claimed by him from the first, the homestead entries of Doyle and O'Malley should be canceled in so far as they conflict with his claims, and he be allowed to make entry for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 7 and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lot 5 of Sec. 8, T. 39 N., R. 7 E.

Your judgment is modified accordingly.

PRE-EMPTION—OFFERED LAND—FILING—SETTLEMENT.

HOLMAN *v.* HICKERSON.

Land once "offered" and subsequently enhanced in price and not afterwards re-offered, is taken out of the category of lands subject to "private entry," and a pre-emption claimant therefor is entitled to thirty three months from date of settlement in which to make final proof.

A pre-emption declaratory statement filed without prior settlement is made good by subsequent settlement in the absence of any intervening adverse right.

In determining whether the residence and improvements shown by a pre-emptor indicate good faith, the degree and condition in life of the entryman may be properly taken into consideration.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 21, 1893.

On November 7, 1888, Dicy C. Hickerson filed at Visalia land district, California, pre-emption declaratory statement (No. 9945) for the SE. $\frac{1}{4}$ of Sec. 30, T. 19 S., R. 17 E., M. D. M. alleging settlement November 3, 1888.

On November 11, 1889, Joseph L. Holman made homestead entry (No. 7338) for the same tract.

On January 25, 1890, Miss Hickerson published notice of her intention to make final proof before the local officers, on July 12, 1890, when said final proof was made.

Said Holman filed a protest, duly corroborated, on said July 12, 1890, against the allowance of said final proof, alleging that said pre-emption claimant had not cultivated any portion of said land, and that she "did not publish notice of her intention to make final proof, nor make final proof upon said land within twelve months from the date of filing her declaratory statement," and asking that he be allowed to cross-examine her witnesses and that her declaratory statement be canceled.

The case was adjourned for a hearing until July 14, 1890, when the parties appeared and submitted testimony.

On December 12, 1890, the local officers rendered their joint opinion, in which they find that "Hickerson, failing to make final proof, or publication of notice of her intention to do so, within the statutory period, has forfeited her right to make entry of the land in presence of the intervening adverse claim of Holman." They therefore refused "to pass said proof to entry," and recommended that her filing be canceled, and that Holman's entry be allowed to remain intact.

On appeal, by letter of April 23, 1892, you affirmed the decision of the local officers, rejected said final proof, held said declaratory statement for cancellation, and allowed Holman's entry to stand.

An appeal now brings the case to this Department.

The specifications of error are as follows:

1. In holding that the land involved herein was, at the date the defendant filed her pre-emption declaratory statement *offered land* and that she having failed to ten-

der her proof and payment within twelve months from date of settlement, her claim was forfeited by the intervention of an adverse claim.

2. In holding that the defendant was under the circumstances of this case, guilty of laches in making proof and payment as required by law.

3. In recognizing as valid the alleged adverse claim of contestant Holman.

4. In finding that the defendant's declaratory statement was illegal for the reason that it was filed before she made any settlement on the land.

5. In finding that the defendant never established a bona fide residence on the land as required by Sec. 2259 of the Revised Statutes.

6. In finding that the defendant had no improvements on the land at the date the alleged adverse claim was initiated.

7. In holding that the defendant had not complied with the requirements of the law as to residence and improvements.

8. In rejecting the defendant's proof and in holding her declaratory statement for cancellation without sufficient cause.

The act of March 3, 1853 (10 Stat., 244), section 6, provides, in part, as follows:

That all the public lands in the State of California, whether surveyed or unsurveyed, with the exception of sections sixteen and thirty-six, etc., . . . shall be subject to the pre-emption laws of fourth September, eighteen hundred and forty-one, with all the exceptions, conditions, and limitations therein, except as is herein otherwise provided and shall, after the plats thereof are returned to the office of the register, be offered for sale, after six months' public notice in the state of the time and place of sale, under the laws, rules and regulations now governing such sales, or such as may be hereafter prescribed . . . and all of said lands that shall remain unsold after having been proclaimed and offered, shall be subject to entry at private sale as other private lands, at the same minimum price per acre.

Under the authority above conferred the land in dispute was "offered for sale" on May 12, 1853, and having then been unsold, was thereafter "subject to entry at private sale" under the laws, rules and regulations then governing such sales, or such as might thereafter be prescribed.

This tract also lies within the twenty mile, primary, limits of the grant made to the Southern Pacific Railroad Company by the act of July 27, 1866 (14 Stat., 292), and opposite to the constructed part of said road.

By letter of March 22, 1867, addressed to the register and receiver at Visalia, Commissioner Wilson, under instructions of the Secretary of the Interior, directed said local officers—

to withdraw from sale or location, pre-emption or homestead entry, all the odd sections within said limits, and no entries will be allowed therein after the receipt of this order, except where bona fide pre-emption claims have attached prior to that time. The even sections within the 20 mile limits will, by virtue of the act of March 3, 1853, be increased to \$2.50 per acre, and subject to the provisions of the pre-emption and homestead laws at that price, except where pre-emption rights may have attached prior to this withdrawal, in such cases these parties may prove up and pay for their claims at the price they were held on the date of settlement. The even sections within the 20 miles *will not* be subject to private entry until duly offered at the increased price. . . . This order will take effect from the date of its reception.

The order was received and took effect May 21, 1867. By virtue of this order the tract in question was taken out of the category of lands "subject to private entry," and placed in the lands "not subject to private entry until duly offered at the increased price." *Eldred v. Sexton* (19 Wall, 189, 195.)

It has continued in the latter category until May 21, 1867 to the present time, for the reason that the land has never been "offered at the increased price."

When, therefore, said Hickerson filed upon this land on November 7, 1888, it was not "subject to private entry," as those terms are used in section 2264, of the Revised Statutes, which requires the pre-emptor of lands of that character to make proof and payment within twelve months after the date of settlement.

On the contrary, as this land has not been proclaimed for sale at the increased price, since its status had been changed to double minimum land, it comes under section 2265, which provides, in part, as follows:

Every claimant under the pre-emption law for land not yet proclaimed for sale is required to make known his claim, in writing, to the register of the proper land office within three months from the time of settlement, giving the designation of the tract and the time of settlement.

The time within which claimants of such pre-emption rights shall "make the proper proof and payment for the land claimed" is prescribed by section 2267, as "within thirty months after the date prescribed therein, respectively, for filing their declaratory notices has expired." *Stalnaker v. Morrison* (6 Neb., 363); *United States v. Budd* (43 Fed Rep., 630).

The final proof of Miss Hickerson was made therefore within the time prescribed by law, and it was erroneously rejected by the local officers, as not having been made within the proper statutory period.

In your decision you further held that said filing was illegal because personal settlement was not made on the land till December, 1888. But inasmuch as the adverse claim of said Holman was not initiated until November 11, 1889, this defect was cured. *Gray v. Nye* (6 L. D., 232); *Dallas v. Lytle* (11 L. D., 208); *Shearer v. Rhone* (13 L. D., 480).

The remaining questions in the case relate to the character of her residence and improvements on the land, and whether or not they show good faith on her part.

In determining these questions, the degree and condition in life of the entryman may properly be taken into consideration. *Helen S. Dement* (8 L. D., 639).

The evidence shows that Miss Hickerson personally settled on the land about December 1, 1888, having previously bought a house eight by twelve feet, and hauled it upon the land. It contained one window, one door, a good pine floor, with a shed attached, six by seven feet. The house was lined and ceiled, and worth \$25. It was carpeted and papered with newspapers. She was poor and resided on the land,

except when at work. She swears she was never absent longer than two weeks at a time, and that she had no home but on this claim. She testified that in December, 1888, she put one acre in potatoes and turnips and other vegetables, and that in December, 1889, she plowed and raised five acres of wheat. She paid for the work by work of her own, as she had no means except what she earned.

After an examination of the evidence, I am of the opinion that she had an honest intention to comply with the law, and that her improvements were commensurate with her means. James Edwards (8 L. D., 353); Findley v. Ford (11 L. D., 172). Her final proof should therefore be accepted, and the entry of Holman should be canceled.

Your judgment is reversed.

FINAL PROOF—ADVERSE PROCEEDINGS.

GANT v. LOCKE.

The pendency of adverse proceedings suspends the running of time allowed a pre-emptor, by statute, for the submission of final proof. The amendment of Rule 53 of practice permits the claimant, if he so desires, to submit proof during such proceedings, but no statutory right is lost by failure to take advantage of said amendment.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 21, 1893.

I have considered the case of Spicy Gant v. David M. Locke, on appeal by the latter, from your decision of April 18, 1890, in which you rejected his final proof of his pre-emption filing for the SE. $\frac{1}{4}$ of Sec. 5, T. 18 S., R. 42 W., Wakeeney land district, Kansas.

The record shows that Mrs. Spicy Gant filed her pre-emption declaratory statement No. 14929, for this tract on December 17, 1888, alleging settlement on the 15th of the same month. On February 23, 1889, David M. Locke filed his pre-emption declaratory statement for the same tract, alleging settlement February 11, 1889.

On April 12, 1890, Locke gave notice of his intention to submit final proof on June 2d following, before the clerk of the district court of Greely county, Kansas. Mrs. Gant appeared and protested said proof, alleging that she had a prior right to said land by settlement and filing.

It appears that she had made, through an attorney, an application to file upon a certain other tract, and that when her attorney went to the land office, he found that particular tract taken; thereupon he, without consulting her, changed her application, and filed upon a tract she had never seen, and did not want. She paid no attention to this filing, but went upon the land in controversy and made settlement, had a house built and established her residence thereon. Afterward she applied to your predecessor, and by office letter "G", of June 2, 1890, the

filing so made by her attorney was canceled, without prejudice to her rights as a pre-emptor.

When the hearing was had, it was sought to have her protest dismissed, because she was not a qualified pre-emptor, but this was not done, however, and the local officers, upon the evidence, rejected Locke's proof, from which he appealed; you affirmed this action, and he again appealed.

There is a motion filed in the Department to dismiss the protest, for the following reasons: First, that Mrs. Gant had not offered final proof, and is now barred by lapse of time from doing so; and secondly, that the decision of the local officers, and affirmed by you, simply held Locke's filing junior to Mrs. Gant's, and subject to her rights, and that she has forfeited her rights, therefore the protest should be dismissed. Thirdly, an affidavit is filed, in which it is sought to be shown that she has abandoned the land, therefore the protest falls.

Under Rule 53, as amended March 15, 1892, Mrs. Gant might have offered final proof, pending the appeal on the case involving the land, but she was not bound to do so. The rule was amended for the accommodation of entrymen, and it says, "The entryman may, *if he so desires*," offer final proof when trial has taken place, and before final judgment on the case, but such proof is to be retained in the local office until the final decision on the case. This rule was to enable parties to take proof where they were likely to lose witnesses by removal, etc., but the principle that a contest or protest having been heard by the local officers, and an appeal taken thereon, removes the particular tract from the jurisdiction of the local officers, "until instruction by the Commissioner", remains in force, with the single exception named. If final proof had been offered, it could only have been retained by the local officers. The filing of Mrs. Gant stands as much suspended as that of Locke, time does not run against her, pending the appeal. For this reason the first two grounds of the motion fail.

As to the third ground of the motion, it may be said that it amounts to asking the Department to cancel a filing on an ex-parte, corroborated affidavit, without notice to the party, and without a hearing. Such a motion can not be entertained. The motion is overruled.

The evidence very clearly shows that Mrs. Gant was prior in time, in settlement and filing. Locke went upon the land while her house was being built, and when it was nearly finished. He simply attempted to take the land and her improvements. This he should not be permitted to do, his filing should be canceled, according to law, but as you have approved the action of the local officers, allowing it to remain of record, subject to the rights of Mrs. Gant, I will allow it so to remain. The decision appealed from is affirmed.

HOMESTEAD ENTRY—APPROXIMATION.

JULIUS CRAMM.

The rule of approximation will be applied to a homestead entry that embraces fractional sub-divisions in two sections.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 21, 1893.

On the 19th of August, 1890, Julius Cramm commuted his homestead entry to cash entry for lots 11 and 12, Sec. 31, T. 25 S., R. 17 E., and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and lot 6 of Sec. 6, T. 26 S., R. 17 E., M. D. M., Visalia land district, California.

According to the certificate of the local officers, the tract embraced 18.41 acres in excess of one hundred and sixty. They issued receipt No. 6359 for the payment for one hundred and sixty acres, and excess receipt No. 5426 for the 18.41 acres.

In a letter addressed to them on the 11th of March, 1892, you informed them that the excess was 17.94 acres, according to the official plats on file in your office, and directed them to notify the party that he would be allowed thirty days after notice, within which to elect which subdivision he would relinquish, so as to make his entry approximate one hundred and sixty acres. You also stated that in the event of his failure to signify his intentions in the premises within the time specified, or to show cause why he should not be required to do so, his entry would be held for cancellation.

On the 11th of May, 1892, the local officers informed you that they had duly notified the entryman of the matters contained in your letter of March 11, 1892, and that no response had been received.

On the 16th of July, 1892, you held said entry for cancellation, and directed the local officers to notify the entryman of that fact, and inform him of his right of appeal. Notice to that effect was sent to the entryman by registered letter, on the 22d of July, 1892, directed to him at his post-office address, where it was receipted for in his name, "per Gruenhagen Bros.," on the 11th of August, 1892.

On the 30th of September, 1892, an appeal was filed in the local office, in which you were notified that "the above named claimant, through his transferees; hereby appeals from your action in holding said entry for cancellation."

The grounds of appeal are then stated, and it is asked that your decision be reversed, and that said entry be confirmed as made, and that patent issue for the land as described in the receiver's receipt. In support of this request, the cases of James Hanna (12 L. D., 356) and Abram A. Still (13 L. D., 610) are cited.

The notice of appeal is signed by a lawyer, who adds after his name the words "attorney for Gruenhagen Bros., claiming under purchase

from claimant, Julius Cramm." Without raising any question as to the right of said parties to appeal, without disclosing the fact that they are the transferees of Cramm, and parties in interest in the proceedings against his entry, it is sufficient to say that the cases cited do not sustain the position taken in their behalf, in the appeal before me.

The entry now contains 177.94 acres, which is 17.94 in excess of one hundred and sixty. From the papers before me, it appears that lot 12 in section 31, contains 27.94 acres. Should that lot be relinquished, the entry would still embrace one hundred and fifty acres. No diagram is furnished, but it does not appear that the relinquishment of that lot would impair the contiguity of the land comprising the entry. With lot 12 excluded, the deficiency in the entry from one hundred and sixty acres would be less than the present excess. The rule governing such cases, as laid down by your office, and approved by the Department, in the case of Henry P. Sayles (2 L. D., 88) is, that where the excess above one hundred and sixty acres is greater than the deficiency would be, should a subdivision be excluded from the entry, the excess will be excluded, but where the excess would not be greater than the deficiency, the entry would be allowed to stand.

This rule has been adhered to by the Department, except in cases where a lot or subdivision could not be relinquished without abandoning improvements, or destroying the contiguity of the tracts entered. In the cases cited by the appellant, the entries embracing an excess over one hundred and sixty acres were allowed to stand because a relinquishment of a subdivision would cause the abandonment of improvements, or destroy the contiguity of the tracts embraced therein. It is not made to appear that any such result would follow the relinquishment of lot 12, in the case at bar.

Unless a relinquishment is made which will make the entry more nearly approximate one hundred and sixty acres, or cause be shown to your satisfaction, why such reduction should not be made, within sixty days after notice of this decision, said entry will be cancelled. Should such relinquishment, or such showing be made, you will take such action in the premises as is proper. The decision appealed from is modified accordingly.

PRE-EMPTION FILING—RESIDENCE—TRANSMUTATION.

BOMGARDNER v. KITTLEMAN.

The infancy of a pre-emptor at date of filing declaratory statement will not defeat the pre-emptive right, if the pre-emptor attains the requisite age prior to the intervention of any adverse claim, and good faith is otherwise shown.

Absences from the land are excusable when necessary to obtain means for subsistence, and for the proper improvement of the land.

An application by a single woman to transmute a pre-emption claim to a homestead entry is not defeated by her subsequent marriage where it appears that she was duly qualified at the date of her application.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 22, 1893.

With your letter ("G") of October 5, 1892, you transmit the appeal of Lizzie M. Bomgardner from your decision of April 19, 1892, holding for cancellation her declaratory statement made June 18, 1888, for the NE $\frac{1}{4}$, Sec. 26, T. 27 N., R. 47 W., Alliance, Nebraska, alleging settlement thereon two days earlier.

On July 7, 1890, she made application to transmute her filing to a homestead entry. Her application was rejected, because of a homestead entry made for the land by one Robert Kittleman, on December 10, 1889.

Thereupon she asked for a hearing to show her superior right to the land. Hearing was accordingly had on August 14, 1890, at which both parties were present.

The register and receiver, on August 20, 1890, decided that the testimony showed no abandonment on the part of Miss Bomgardner, and that her application to transmute her filing should be allowed, and Kittleman's entry canceled.

Your said decision, as above shown, reverses that action, and Miss Bomgardner has appealed therefrom to this Department.

When Miss Bomgardner made her filing she was not twenty-one years old, not attaining that age until March, 1889—she was therefore not a qualified pre-emptor. Your holding, however, that her infancy at date of filing would not defeat her claim, if she attained the required age before any adverse claim attached, good faith being otherwise shown, is correct, and the only question to be determined on the appeal is, whether her residence, improvements, etc., as shown by the testimony, were such as gave her the superior right to the land as against the entry of Kittleman, made nearly eighteen months subsequent to her filing.

The evidence shows that she was in indigent circumstances and compelled to work away from home, as a domestic, doing kitchen and dining-room work, for her support and to obtain means to improve the place. The improvements made on the land were placed there by her.

self and others, and consisted of a house eighteen by twenty feet, with two windows and one door, comfortable at all seasons of the year, and valued at \$100; a cave ten by twelve feet; chicken house twelve by fourteen feet; a well twenty-seven feet deep, affording good water; and six or eight acres broken and in cultivation; twenty-five peach trees, and one hundred ash and box elders; total value of improvements \$250. She finished her house about July, 1888, and broke two or three acres of land that season, and established her residence. She swears that she had no other place of residence, and settled on the land for a permanent home; she had the usual articles of household and kitchen furniture in the house, consisting of table, stove, chairs, trunk, etc., and when away from the place she always left these goods in the house. She worked sixteen weeks for her sister, doing kitchen work. She was at the Union Hotel, in the capacity of a dining-room girl, from November 17, 1888, until February 20, 1889, and at the Clifton House, in the same capacity, from March 1, until December 2, 1889. During these periods, and once or twice in each month, she returned to her home, generally staying a day or two each time, and looking after the affairs on her place, and losing her time at the hotel. Her mother and father lived on the place, from November, 1888, to July, 1889, a part of which time she was employed elsewhere. She appears to have been on the place and at work, setting out trees, digging potatoes, etc., when not hired out.

Witness De Hart testified that claimant had resided on the land since about the time she filed. Saw her there frequently, and saw chickens about the house and smoke issuing from the chimney.

Witness Ruggles testified that her residence had been on the place since filing, having frequently seen her there, but that by reason of her employment she was not continuously at home.

Witness Crozier testified that claimant had resided on the place a part of the time, and always considered it her home and residence, "and during her absence she left in the house all necessary household furniture for use on her return." Saw her there more or less every month from July to December, 1889, and in 1890 all the land broken, six or eight acres, was cropped to barley and oats. This witness knew claimant worked out for a living.

The evidence on part of defendant's witnesses is of a negative character, and consisted mainly in the statements of witnesses who were at or near the place on different occasions, and saw no one living there, or any signs of habitation.

The absences from the place, their duration, etc., are found largely from claimant's own testimony. She kept these dates, and also the time she was at home, to enable her to make satisfactory settlements with her employers for the time she was at home, which corresponded with the time lost in her employment, as above set out. It is true, that she spent more time in working for others than she did at home. But

it nowhere appears that she had any other home, and the evidence shows that she was dependent upon her own labor for support, and that it was necessary to work away from home for her own subsistence and to gain means to improve her place. This she did, and the improvements she made on the place were of themselves ample, under all the circumstances, to show her good faith. Kittleman made his entry with full knowledge of all these improvements.

Again, the fact that Miss Bomgardner applied to transmute her filing to a homestead entry, thus proposing to live full five years on the land before she could obtain patent, negatives the idea that she took the land for speculative purposes.

I think it is sufficiently shown that she established a bona fide residence on the land; that her absences therefrom for the reasons given are excusable, and that her residence has been continuous. (Nellie O. Prescott, 6 L. D., 245.)

Among the files in this case is a paper purporting to be an answer to the appeal herein. Certain statements of fact are made therein, duly sworn to; but, inasmuch as this so-called answer does not appear to have been served on the opposite party, and no notice thereof given, as required by the Rules of Practice, the same will not be considered.

I find, however, that the return registry receipt, which accompanied the notice sent by the register and receiver, on April 22, 1892, informing claimant of your said decision holding her filing for cancellation, is signed "Lizzie M. Bomgardner, now Mrs. Chilson," which indicates that she has been married since the hearing before the local officers. As a married woman, she is now disqualified from making homestead entry. Her application to transmute her filing was made, however, before she became disqualified by her marriage and after she had attained the required legal age, and, as above seen, the hearing showed that her residence, cultivation, etc., were ample to show her good faith and her right to transmute. Her application to enter, being a legal one at the time, was while pending equivalent to an actual entry, so far as her rights are concerned, (*Pfaff v. Williams*, 4 L. D., 455; *Arthur P. Toombs*, 10 L. D., 192; *Griffin v. Pettigrew*, *idem.*, 510), and an entry made by a single woman is not affected by marriage before final proof (*Alice M. Gardner*, 7 L. D., 470).

The law regards that as done which should have been done, and I concur in the opinion of the register and receiver that her application should have been allowed on the termination of the hearing, which she invoked to show her superior right.

Miss Bomgardner will therefore be allowed to transmute her filing to a homestead entry as of the date of the decision of the register and receiver (August 29, 1890), awarding her that right, and Kittleman's entry will be canceled.

The decision appealed from is accordingly reversed.

HOMESTEAD ENTRY—EQUITABLE ACTION.

COOKE v. VILLA.

Equitable action on a homestead entry, under which final proof is not submitted within the statutory period, is defeated by an intervening contest on behalf of an adverse applicant for the tract involved.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 22, 1893.

The land in controversy is the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and lots 2, 3, 4, 5 and 6, Sec. 26, T. 1 N., R. 14 W., S. B. M., Los Angeles, California, land district.

The record shows that Ramon Villa made homestead entry of said tract December 6, 1882. On January 9, 1891, Bartholomew Cooke made homestead application for said land, which was rejected by the register "on the ground that the tract applied for is covered by homestead entry No. 1158 of Ramon Villa, filed December 6, 1882." On the same day Cooke appealed from this decision, setting up various grounds of error, which are substantially that the claimant has not complied with the law as to residence and cultivation, and that he had not offered final proof within seven years from date of his entry and asked that a hearing be ordered "as per rule one of practice." The said appeal was accompanied by the affidavit of Cooke and another.

On January 9, 1891, the register notified Villa that the homestead law required "that final proof of settlement and cultivation be made within two years after the expiration of five years from date of entry," that "the time fixed by the statute has expired," and directed him to show cause within thirty days why his claim should not be canceled. Thereupon on January 19, 1891, he applied to make final proof, and after due notice offered the same before the register and receiver on April 1, following. In the meantime on March 16, 1891, you ordered a "hearing on said appeal and affidavit."

On April 1, Cooke appeared and filed his protest against the final proof alleging:

(1) Over seven years have elapsed since said entry was made and it now is void and expired by limitation.

(2) Said Villa has not made *bona fide* continuous residence on said tract since making entry thereof.

(3) His cultivation, improvements and use made of said tract do not entitle him to a final homestead receipt therefor.

(4) Said final proof should be rejected for want of good faith of the said Villa; protestant alleges that the tract in question has suffered in value from the occupancy of Villa—more value in wood having been removed therefrom by said Villa than he added thereto by his improvements.

(5) Said final proof should be rejected on the further ground that the protestant has made a homestead application for the tract in question, the same being now a matter of record, and a hearing ordered thereon by Commissioner's letter "H" March 16, 1891, said allegations protestant is ready to prove at such time as you may grant a hearing therein.

The attorneys of the respective parties stipulated in writing "that the entire evidence in the matter be now taken and notice waived on the part of said Villa, and this be considered as a *contest* hearing as well as *protest* against acceptance of final homestead proof of said Villa."

A hearing was had before the local officers and as a result they held that the final proof of Villa should be rejected because presented more than a year after expiration of the period within which a homestead claimant is required by law to present the same. While they recite briefly the evidence pro and con on the question of residence and cultivation yet they did not pass upon it, but based their decision wholly on the other question. Villa appealed and you by letter of May 6, 1892, reversed their judgment. You found that Cooke had not sustained his charges of failure to comply with the law as to residence and cultivation, and therefore the question was as to whether "the failure to submit final proof within the statutory period calls for the cancellation of his entry." This question you decided in the negative, holding that Villa's entry should be submitted to the board of equitable adjudication for its action.

Cooke appeals.

He assigns the following errors:

(1). The findings of good faith as to residence and improvements of Villa are not sustained by the evidence.

(2). It is shown by the evidence that Villa, willfully neglected making final proof until the adverse claim of Cooke was made a matter of record.

(3). The Commissioner erred in finding that contestant Cooke did not charge a failure (on the part of Villa) to make final proof within the statutory period and is not entitled to a judgment by reason of that fact.

(4). The Hon. Commissioner errs in finding Cooke's application is not an adverse claim and of no effect.

(5). In the face of an adverse claim Villa can not plead equity and have his case referred to the Board of Equitable Adjudication and it is an error to so hold.

The fact that Villa did not offer his proof within the time allowed by law is not disputed; he knew he was required to make it within seven years after the date of entry; he lived within eight miles of the local land office and was frequently in the city where it was located; thirteen months after the time for making proof had expired Cooke made his homestead application to enter the tract, but owing to the fact that Villa's entry still remained of record Cooke could not be allowed to make his entry. While this was so, it seems to me that Cooke's application and his affidavit filed on the same day, was tantamount to the assertion by him of a "claim" to the land within the meaning of section 2456 Revised Statutes, which defines the character of the cases and the circumstances under which they may be passed upon by the board of equitable adjudication, as follows:

Where the law has been substantially complied with, and the error or irregularity arose from ignorance, accident or mistake, which is satisfactorily explained; and where the rights of no other claimant or pre-emptor are prejudiced, or where there is no adverse claim.

Under these limitations and restrictions the case could not properly be referred to the board of equitable adjudication in the presence of such a claim as Cooke presents.

The Department has no power by rule, regulation or otherwise to extend the time allowed by law for making final proof, and in the presence of an adverse claim an entry can not be submitted to the board of equitable adjudication where the proof is made after the expiration of the statutory period. See John C. Mounger, 9 L. D., 291.

Villa's homestead entry will be canceled and Cooke's application to enter will be allowed. The decision appealed from is reversed.

HOMESTEAD CONTEST—HEIRS OF HOMESTEADER.

RICHARDS *v.* RASMUSSEN.

Where a homesteader dies leaving a widow, who also dies before compliance with the homestead law, the right to acquire patent passes to the heirs of the entryman, both adults and minors, equally, and the subsequent failure of said heirs to reside upon or cultivate the land operates as an abandonment thereof.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 22, 1893

With your letter ("H") of November 12, 1892, you transmit the record in the case of Jennie Richards *v.* Peter Rasmussen, upon the appeal of the former from your office decision of May 10, 1892, affirming the action of the register and receiver holding intact Rasmussen's homestead entry, made March 10, 1885, for the NE. $\frac{1}{4}$ of Sec. 10, T. 13 N., R. 7 E., Sacramento, California.

It appears that one James Ferguson made homestead entry of the land September 10, 1881; and on October 14, 1884, Rasmussen brought a contest against the same, charging abandonment, etc. Service was obtained by publication, and no defense was made, resulting in a cancellation of the entry by your letter ("C") of February 9, 1885.

On October 31, 1890, Mrs. Jennie Richards, a stepdaughter of the entryman, filed a duly corroborated affidavit, setting forth, in substance, that Ferguson moved on the land after his entry; that in July, 1882, he was taken sick (with consumption), and to obtain better care and proper medical treatment, he was taken to the county hospital, where he died November 22, 1882; that his wife continued to live on the land, cultivating and improving the same, until the winter of 1883, when she was taken sick, and died April 14, 1884, at Sacramento, where she had gone for medical treatment; that after Ferguson's death, his son, by a former wife, lived with Mrs. Ferguson, until the latter was moved for medical treatment, when he went to live with his married sisters—one living in Nelson, and the other in Placerville, in

the same State; that she was living on an adjoining tract, claimed an interest in the land as daughter of Ferguson's widow, and that she had no knowledge of Rasmussen's contest, and no evidence thereof, until long after the latter settled on the land; that she was induced by the advice of friends to believe that she would not lose her rights to the land until she was afterwards advised that Rasmussen had entered the land; that none of the heirs had ever received notice of Rasmussen's contest.

Hearing was had, and the register and receiver decided that Ferguson's entry was canceled without due notice to Ferguson's heirs, and the whole proceedings were for that reason a nullity, service being had upon a dead man by publication.

The decision, however, concludes as follows:

Inasmuch the heirs have had an opportunity at this hearing, inaugurated by themselves (Mrs. Jennie Richards having been authorized to appear for and to represent the other heirs), to establish their claim to the land, if any they had, and inasmuch as it has been proven that they had forfeited any rights they may have had by abandonment prior to the time Rasmussen's complaint against James Ferguson was filed, we find that they lost nothing by his (Rasmussen's) failure to serve notice of contest upon them that justice will be best subserved by allowing Rasmussen's entry to remain undisturbed the evidence showing that he has complied with the law as to residence and cultivation, etc.

Your said decision affirms that of the register and receiver, and is based upon the same reasoning.

The testimony shows that Ferguson had lived on the land a few months before he was taken to the hospital, where he died in September, 1882. It is not very clear as to whether his widow lived on the land or not, or whether she made any additional improvements thereon after his death. Ferguson was a very poor man, and in ill health when he settled on the land. All he did was to build a barn (used temporarily for a residence until he was able to build), and cut away the brush around the same; he cultivated no land, nor did his widow. The evidence is also very clear that, after the death of Mrs. Ferguson, the land was wholly abandoned, until six months had elapsed, when Rasmussen moved thereon, no additional cultivation or improvements having been made.

If, however, the heirs had resided upon or cultivated the land for the required time after Mrs. Ferguson's death, Mrs. Jennie Richards, being no heir of the entryman, would have had no interest in the land, and was therefore not entitled to notice. *Wise v. Swisher* (10 L. D., 240); *Alcott's Heirs* (13 L. D., 131).

The testimony shows that Ferguson left three heirs—two married daughters and one son, sixteen years old. By power of attorney, Mrs. Richards represented them at the hearing.

Section 2292 of the Revised Statutes provides that: "In case of the death of both father and mother leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the

benefit of such infant child or children." It further provides that within two years after the death of the surviving parent, the land may be sold for the benefit of such infants, "and the purchaser shall acquire the absolute title by the purchase."

It follows that, upon the death of a surviving parent, the homestead law having been complied with up to that period, the fee to the land covered by the entry (if there be no adult heirs) is cast, *eo instanti*, by operation of the statute, upon the "infant child or children," the only thing being necessary to secure the proceeds of the land "for the benefit of such infants" is for the executor, administrator, or guardian thereof to sell the land within two years, the purchaser acquiring thereby "the absolute title."

It is held, however, in the case of *Bernier v. Bernier*, 147 U. S., 242, that when a person makes a homestead entry of a tract of public land and enters into occupation of it with his family and dies a widower the right to complete the proofs and acquire patent passes under section 2291 of the Revised Statutes to all the children equally, as well to those who are adults, as to those who are infants.

The same rule would obtain where the entryman dies leaving a widow, who also dies before the homestead requirements have been completed.

In discussing sections 2291 and 2292 of the Revised Statutes, the supreme court, in the decision above cited, says:

They point out the conditions on which the homestead claim may be perfected and a patent obtained; and these conditions differ with the different positions in which the family of the deceased entryman is left upon his death. If there are adults as well as minor heirs, the conditions under which such claim will be perfected and patent issued are different from the conditions required where there are only minor heirs and both parents are deceased. In the one case the proof is to extend to that of residence upon the property or its cultivation for the term of five years but in the other case, where there are no adult heirs and only minor heirs, and both parents are deceased, the requirements exacted in the first case are omitted, and a sale of the land within two years after the death of the surviving parent is authorized for the benefit of the infants.

Since there were two adult heirs and one infant heir left upon the death of both the entryman and his widow, and since in such case the law requires either residence upon the property or its cultivation for five years, and since there was neither residence nor cultivation of the land after the death of the widow, but, on the contrary, a complete abandonment of the same for more than six months, the entry was subject to contest and cancellation.

The hearing, which was had at the instance of one having power of attorney from the heirs, unquestionably shows that the rights of the heirs were lost by abandonment; and while the entry was in the first instance wrongfully canceled, yet the hearing, subsequently had, shows that by such illegal cancellation no rights which the heirs then had have been taken away, for they had none to lose.

It may be pertinently asked: Why should the infant son, of tender years, be made to suffer loss through the laches of his adult sisters in not complying with the law above set forth? Being an infant, he is not supposed to have known his rights, and was therefore not personally chargeable with laches. Had he been the only heir, the fee to the land would have been cast upon him, and power given under the statute for its immediate sale for his benefit. Having adult sisters, however, the right to his share of the land depended upon a continuation of the requirements of the homestead laws, which requirements could have only been performed by such adult sisters, or a guardian, duly appointed, for the infant heir, and in no case would it seem that laches could properly have been imputed to the infant.

The only explanation, as it seems to me, to this anomalous condition lies in the statute itself, as construed by the supreme court, which clearly requires that where there are both adult heirs and minor heirs, the land shall be resided upon or cultivated for the entire five years before patent can issue.

At the time of the hearing in this case, the minor had ceased to be an infant, being twenty-two years old, and having rested for one whole year after his majority, without asserting any claim to the land, it may be said that he waived any rights that he had to the land, even if he had any rights prior to his majority.

The judgment appealed from is affirmed, and Mr. Rasmussen's entry will remain intact, subject to his ability to show full compliance with the law when final proof is offered.

HOMESTEAD ENTRY—RESIDENCE—MARRIED WOMAN.

LINCOLN *v.* GISSELBERG.

A single woman, who makes a homestead entry and subsequently marries, and thereafter lives with her husband (who had filed for an adjacent tract) in a house built across the dividing line between the two claims, by such residence abandons her own entry.

First Assistant Secretary Sims to the Commissioner of the General Land Office, August 22, 1893.

I have considered the case of T. J. Lincoln *v.* Caroline E. Gisselberg, upon appeal by the latter from your decision, holding for cancellation her homestead No. 5,500, made October 21, 1884, for the SW. $\frac{1}{4}$ of Sec. 14, T. 8 N., R. 5 W., Vancouver land district, Washington.

This case was decided by the register and receiver in favor of the plaintiff, June 5, 1891. On June 30, 1891, appeal was taken by claimant to you, and on April 30, 1892, you rendered your decision, sustaining the local officers.

The facts shown by the evidence are as follows:

Caroline E. Gisselberg made entry for above tract October 21, 1884,

and subsequently, in August, 1886, married Jonas Gisselberg who had previously made his pre-emption declaratory statement upon an adjoining tract, and went to live with him in his house, situated on the dividing line between their claims, this being the house, as is shown by the evidence, (Jonas Gisselberg's testimony) under which he made his final proof.

It has been held, 9 L. D., page 426, that separate residence by husband and wife cannot be maintained, living together as such in a house built across the line between the two claims. See also 11 L. D., 22 and 207; 12 L. D., 443 and 197; 13 L. D., 734 and 15 L. D., 377 and 574.

The case of Maria Good (5 L. D., 196) is not applicable to this case. There it was held that the marriage of a woman did not of itself affect her right to make homestead final proof. This is not the question now at issue. The point here decided is, that the wife moving into the house on the dividing line between the two claims, it being the same house that was used by her husband to make final proof in his pre-emption claim, is abandonment on her part of her homestead entry.

It thus becomes unnecessary to discuss the questions of improvement of the homestead entry, or the legal effect of the claimant's absence. Your decision is therefore affirmed.

ATTORNEY—SECTION 190, REVISED STATUTES.

W. D. HARLAN.

The phrase "claim against the United States," as employed in section 190 of the Revised Statutes, must be construed as meaning a money demand against the United States; and it therefore follows that the inhibition contained in said section does not extend to a former employé of the General Land Office, who appears before the Land Department on behalf of an applicant for a tract of public land.

Secretary Smith to the Commissioner of the General Land Office, August 23, 1893.

W. D. Harlan, attorney, appeared at your office for the purpose of representing Dorus M. Fox, who was seeking to amend his homestead entry, No. 1184, Des Moines, Iowa.

In your letter of June 30, 1893, you refuse to recognize him as attorney in said case, and he has appealed to this Department.

Your refusal was based upon the ground that W. D. Harlan was disqualified, under departmental construction of section 190 of the Revised Statutes in the case of Luther Harrison (4 L.D., 179).

Harlan was inspector of surveyors-general and United States land offices, from July, 1889, until June, 1893, during which time the case of Fox, in which he desired to appear as attorney, was pending before the land office.

The section (190 Revised Statutes) upon which your action was based provides that:

It shall be unlawful for any person appointed after the first day of June, one thousand eight hundred and seventy-two, as an officer, clerk, or employe in any of the Departments to act as counsel, attorney, or agent for prosecuting any claim against the United States, which was pending in either of said Departments, while he was such officer, clerk, or employe, nor in any manner, nor by any means, to aid in the prosecution of any such claim, within two years next after he shall have ceased to be such officer, clerk, or employe.

The proper solution of the question presented in the appeal of Harlan depends upon the meaning of the words "prosecuting any claim against the United States."

The litigation between citizens seeking to acquire title to public lands, under the homestead and other laws, is in no sense a claim *against* the United States, nor is an ex-parte proceeding, such as that begun by Fox, for whom Harlan proposed to appear as attorney, a "claim *against* the United States." The citizen in his relation to the government, while availing himself of the benefit of the land laws, is simply exercising a right conferred upon him by the voluntary act of the government. In so far as the great mass of land cases are concerned, it is an indifferent matter to the government who prevails, except in that broad and comprehensive sense in which it is interested in the maintenance of law and order.

"Mr. Fox is not "prosecuting a claim against the United States," he is simply endeavoring to avail himself of the benevolence of the government. This view appears to be conclusive of Harlan's right to appear as his counsel. If, therefore, the case of Fox is not a proceeding *against* the United States, Harlan is not disqualified to appear as his attorney, no matter what meaning may be given to the word claim as used in the statute.

It is important, however, to ascertain the meaning to be given to the word "claim" as used in the section under consideration.

The statute includes all Departments in which are pending claims against the United States. It is limited in its application by its own terms to claims. It does not affirm that all cases are claims; we are left therefore to employ the ordinary rules of interpretation to ascertain the legislative intent.

Section 3477 of the Revised Statutes contains the following:

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

This statute was enacted in 1853, under the title of "An Act to prevent frauds upon the Treasury of the United States." The 2d section

of that act contains a provision disqualifying any officer of the United States, or person holding any place of trust or profit, or discharging any official function under or in connection with any executive department of the Government of the United States, etc., from becoming an agent or attorney for prosecuting any claim against the United States. This statute, treating the word claim as something which can not be assigned until "after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof," contains its own legislative interpretation, clearly limiting its application to a money demand against the government.

Where the meaning of a word is clearly defined in one statute, it is regarded as a legislative interpretation, and will be given the same meaning when used in another statute upon the same subject. The statute of 1853 disqualifies certain officers of the government from prosecuting any claim against the United States. Section 190, Revised Statutes, disqualifies certain persons who have been employes from prosecuting any claim against the United States. The former furnishes a rule for the interpretation of the latter statute.

In the case of the *United States v. Gillis* (95 U. S., 407), the statute of 1853 has received a judicial interpretation.

Counsel for *Gillis*, having in mind section 236 of the Revised Statutes, which provides that "All claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the Department of the Treasury," contended that the act of 1853 is applicable only to claims asserted before the Treasury Department.

The court, however, did not so limit the application of the statute, but construed the act to include such claims as were presented to Congress, and such as were set up by defalcation in suits brought by the government. The court, in said case, said, also, that the act of 1853 "embraces every claim against the government, however arising, of whatever nature, and wherever and whenever presented."

Now, the court pointed out the claims which Congress had in view, all of them being money demands, and in perfect harmony with the caption and body of the act under consideration.

The plain and manifest meaning of the word claim against the United States, as used in the decision, is that the act embraces all claims, and that all claims are money demands.

Again, it is decided in the "*Abbotsford*" case, in the 98th United States, page 400, that when words used in a previous act have acquired by judicial interpretation a definite meaning, they will, when used in subsequent acts, be presumed to be used in the same sense.

Claim against the United States, therefore, as used in Section 190, Revised Statutes, must be construed as meaning a money demand against the United States.

In seeking the legislative intent, and keeping in mind the mischief sought to be remedied by the statute, it is not improper to inquire somewhat into the history of its enactment.

Section 190 of the Revised Statutes is included in the Post Office appropriation bill, approved June 1, 1872. It seems that the act grew out of a scandal emanating from the acts of a clerk, who, taking advantage of his position, familiarized himself with a large number of claims against the government, left its service, and sought and obtained employment of the claimants, prosecuted the claims, and received a large percentage of the recovery as compensation.

It will be borne in mind that the acts of the clerk, a repetition of which is sought to be prevented by the Statute, relate to money demands.

In 14th Peters, page 178, the court say:

It is undoubtedly the duty of the court to ascertain the meaning of the legislature from the words used in the statute, and the subject matter to which it relates; and to restrain its operation within narrower limits than its words import, if the court are satisfied that the literal meaning of its language would extend to cases which the legislature never designed to include in it.

In the case of Luther Harrison (4 L. D., 179), the reason given for extending the inhibition of section 190 to all cases in this Department is in the following language:

Certain government employes are the trusted custodians of its books and papers, while others have free and unrestricted access to the same. It might be an easy thing for a faithless employe to use his time, not in the speedy and just settlement of claims against the government during the term of his office, but in preventing such settlement, and putting them in such a shape as to enable him to reap handsome profits by their unjust settlement after the term of his service has expired.

In view of the fact that in cases pending before your office or in this Department, in which persons are seeking to acquire title to the public lands, all parties in interest have access to the papers, that the evidence is prepared elsewhere and before they reach your office, that it is not in the power of a clerk to hinder or retard the consideration of a case, that all his work is reviewed by the Commissioner and the Secretary, it is not easy to conceive by what means an employe can put a case in such shape as to reap a handsome profit, after his term of service expires.

The case of Dorus M. Fox, not being a money demand against the government, W. D. Harlan was not disqualified to act as his attorney. Therefore your said decision is reversed.

PRACTICE—INTEREST OF LOCAL OFFICER—REHEARING.

EMBLEM *v.* WEED.

(On Review).

A local officer, who has a property interest in the subject-matter involved in a contest, is not qualified to try and determine the case.

There is no limitation as to the time within which a motion for a new hearing, based on newly discovered evidence, should be filed.

Secretary Smith to the Commissioner of the General Land Office, August 25, 1893.

On March 2, 1893, George F. Emblen filed in this Department his motion for review and reversal of the decision of the Department in the case of said Emblen *v.* George F. Weed, 16 L. D., 23, alleging the following grounds of error:

1. In not finding that the contestant had proven the allegations of his contest affidavit, as he proved that Weed did not reside upon the land in controversy, and there was no proof contradicting or tending to contradict said testimony.

3. In not holding that it was error to order a further hearing after the case had been duly closed and after Weed had waived all right to offer testimony by declining to do so when he had his day in court.

3. In considering the testimony taken at said hearing on September 16, 1890, when said testimony was wholly incompetent because not offered at the only hearing at which said Weed had a right to offer testimony.

4. In not disregarding all testimony taken at the hearing of September 16, 1890, and in not declaring all proceedings under said testimony as null and void because the case had been legally closed as to all parties.

5. In not declaring that the only competent testimony in the record was that taken on April 25, 1889, and in not holding from said testimony in favor of the contestant because said testimony clearly shows that Weed did not reside upon the land as very fully appears by reference to the testimony of Edward Dunn, Sarah Dunn, and Mrs. Charles Harvey.

6. In not holding that it was error in the Commissioner of the General Land Office in recalling and revoking his order of cancellation because said order of cancellation was warranted by the undisputed testimony taken at the hearing on April 25, 1889.

7. In deciding the case upon a mutilated and insufficient record, as the papers originally filed in the case were not all on file when the Honorable Secretary rendered his decision, to wit, the first two pages of the testimony taken at Denver, April 25, 1889; the lumber bills signed by George Fred Weed at Benkleman, Nebraska, during the months of August, October, and November, 1885; also a photograph filed in the case. Said lumber bills tended strongly to contradict the contention that Weed lived on the land at the time claimed by him.

8. In deciding the case upon this incomplete record when the papers in the case had been tampered with for a corrupt purpose or had been accidentally mutilated by which the rights of Emblen had been prejudiced. Whereas, if the entire record had been before the Department, it might have reached a different conclusion.

9. In holding contrary to the law.

10. In finding contrary to the evidence.

Subsequently, Weed, by his counsel, moved to dismiss the same, because not filed in time.

April 4, 1893, Emblen, in support of his motion, filed his affidavit showing that since the trial he had discovered new evidence, which consists of two way bills of lumber and hardware shipped from Denver on April 15, and 21, 1885, to George F. Weed, the claimant, which Emblen, in his said affidavit, alleges to have been used by Weed in the construction of his shanty on the claim. Copies of these way bills are attached to his affidavit.

Weed made pre-emption cash entry for the SE. $\frac{1}{4}$ of Sec. 22, T. 2 N., R. 48 W., Denver, now Akron, Colorado, September 19, 1885.

On the fourth day of the next month, Emblen filed an affidavit of contest against said entry, alleging that it was fraudulently made for trade and townsite purposes, and that he had never complied with the requirements of the pre-emption law as to residence on the land, etc.

May 21, 1889, the local officers at Denver recommended a dismissal of the contest, upon the ground that the allegations therein were not sustained by the evidence.

Emblen appealed, and on February 20, 1890, your office reversed the action of the register and receiver, and held the entry for cancellation, finding that the evidence showed that "said Weed never before date of said entry became a bona fide resident upon said land or resided on the same in good faith."

Weed moved for a review of said decision, and asked if that could not be granted, that a new hearing might be ordered before the local office.

In the meantime, a town of several hundred inhabitants had been built upon the land, and the mayor and board of trustees of the town petitioned that a hearing be granted, and that they be allowed to intervene and be made parties defendant. Several citizens of the town asked also for a rehearing and to be allowed to intervene in their individual rights as property owners in the town.

On consideration of these several motions and petitions, your predecessor, while holding that no sufficient showing had been made upon which to grant a rehearing, directed a further hearing to be had, in order to allow Weed to rebut the testimony presented by Emblen at the Denver office, the contest there having been dismissed on the evidence produced by the contestant, the defendant having introduced no testimony, except a deposition taken at the instance of the contestant, and a certified copy of his final proof testimony. It was also ordered that at the new or supplemental hearing, the defendant should first introduce his testimony, after which the contestant would be allowed to offer other testimony in rebuttal.

Before the date fixed for the hearing, a land office was established at Akron, Colorado, which embraced in its jurisdiction the land in controversy. In consequence of this change in jurisdiction, all the papers in the case were transferred to the Akron office, and the parties in interest were notified by the register of that office to appear there on the 16th of September, 1890, and submit their additional testimony.

Emblen made no appearance at this hearing, but forwarded through the mail a protest against the jurisdiction of the Akron officers, for the reason that the receiver of said office was an interested party, because he was the owner of a lot in the town of Yuma, the title for which he had derived from Weed, the claimant. His protest was overruled, upon the ground, as stated by the local officers, that "the receiver does not feel prejudiced in this contest one way or the other," and the trial proceeded *ex-parte*.

Weed introduced a great number of witnesses, nearly all of whom were residents of Yuma, their testimony going to show that Weed had complied with the requirements of law as to residence, etc., and also impeaching the credibility of two of the main witnesses for the contestant, who had been examined at the Denver office. Testimony was also introduced to impeach and destroy the character of Emblen, the contestant.

November 4, 1890, the local officers rendered their decision, as follows: "We find the preponderance of testimony in favor of claimant's good faith in acquiring title to this land, and dismiss the contest."

Emblen appealed, and on May 28, 1891, your office affirmed the action of the local office, and held that Emblen had no right to appeal, because (as appears from the record) he had waived his claim to preference right at the date of the hearing at the Denver office.

Upon the rejection of his appeal, Emblen applied to this Department for an order directing your office to certify the record here for examination, which was granted (see 13 L. D., 722). Upon receipt of the record, this Department, by decision of date January 9, 1893 (16 L. D., 28), affirmed the action of your office in dismissing the contest, and it is for review of this judgment that the motion now before me was filed.

The charges contained in the brief of counsel for contestant, against the good faith of the entryman, are so grave that the whole record, including the testimony at both hearings, has been carefully examined.

The evidence adduced at the first hearing, which was had at Denver, unquestionably warranted the decision of your predecessor, Commissioner Groff, in holding the entry for cancellation. Three witnesses for the contestant swore that the claimant had never resided on the land; two of them, Dunn and his wife, testified that the house on the claim was not built until the latter part of April, 1885, and that it leaked and was uninhabitable; that they themselves moved into it and remained there a week or two during the time Weed claimed to have resided there, and were forced to abandon it because it would not shed water; that during all the time he claimed to reside there he was only an occasional visitor, coming on the morning train and leaving on the return train the same day. Dunn was employed to build his shanty, and his wife washed for Weed. He would bring his clothes to her from Benkleman. Mrs. Harvey corroborated them as to his non-residence on the land.

The defendant did not testify, but introduced a certified copy of his final proof, and also a deposition of one Foster, which had been taken by the contestant, but not introduced by him.

Mr. Foster's testimony was to the effect, that he was a grocery keeper in Yuma from August 10, 1885, until the spring of 1887; that his store was situated on the railroad company's right of way, until April or May, 1886, when he moved it on to the tract in controversy. As to Weed's residence and occupancy of the shanty, his testimony is as follows:

I know that George F. Weed had a house and resided on the SE. $\frac{1}{4}$, Sec. 22, T. 2 N., R. 48 west, as I often see him there; visited him in his house; called once before he was up in the morning; saw him in bed; have seen smoke issuing from his stove-pipe; have seen supplies of provisions in his house that he had prepared for use, of my own knowledge; I do not know that he had any other home during this time up to 1886.

Some other depositions were had tending to show that during the summer Weed claimed to reside upon his claim he was foreman and manager of a lumber yard in Benkleman, Nebraska, said to be about eighty miles from the land, and upon this testimony the local officers found that the evidence was not sufficient to "warrant us in overruling the former decision of this office," and dismissed the contest. The "former decision" referred to was the acceptance of the final proof.

At the hearing ordered and had at the Akron office, fifteen witnesses were examined by Weed. Of all these but two testify to his continuous residence upon the land. These two witnesses are William C. Orum and T. B. Babcock, who were also his final proof witnesses. The remaining thirteen witnesses were used chiefly to impeach the testimony of Dunn and his wife, who were witnesses for the contestant at the Denver hearing, and also to assail the character and good faith of the contestant. His own testimony and that of Orum and Babcock is to the effect that he built his shanty on the land in the month of February, 1885. Dunn and his wife, at the Denver hearing, say that his shanty was not built until the latter part of April. He says that his first act of settlement was building his house, house, when he immediately moved into and remained there until September, 1886. Although many witnesses at the Akron hearing swear that Dunn's reputation is bad, and that they would not believe him under oath, and that his wife was so completely under his control as to vitiate her testimony; yet the evidence discovered since the hearing, on its face, seems to show that these impeached witnesses were about the only ones who told the exact truth as to the date of the construction of the claimant's house. This date is most material, because by Weed's own testimony it fixes the date of his settlement on the land, and, if this occurred on the last of April, instead of February, his residence, granting it to have been continuous, could not have exceeded five months at the date he made final proof, September 19, 1885.

The testimony taken at the Akron office is unsatisfactory in some respects. The witnesses nearly all seem to be not only interested, by reason of their residence on the land embraced in the entry, but many of them disclose a prejudice against the contestant. Some of them were indicted through him for a riot or some breach of the peace in endeavoring to force his removal from the town. They say that his presence was obnoxious, on account of his bad character and immoral practices. What these practices consist of is but vaguely hinted at in the evidence, and leaves a candid examiner with some suspicion that the true basis of their prejudice is his interference with the entry upon which their property rights are dependent.

It is also shown by the record that the receiver of the office at Akron has some property rights that would be disturbed by the cancellation of this entry. While there is no rule or regulation of this Department providing for a change of venue in such case, or the substitution of some other officer not interested in the result of the trial, every consideration of propriety would dictate that one having an interest in the controversy should not be permitted to control or participate in the judgment. Such an exercise of jurisdiction is abhorrent to English and American jurisprudence. In fact, such an interest, *per se*, disqualifies the court from exercising jurisdiction.

When this case was brought before the Akron office, it was the clear duty of the receiver of that office either to have disposed of his interest in the land in controversy, or resign his office of receiver. It will not do for him to say that he does not "feel prejudiced one way or the other." The fact that he has a property interest in the controversy deprives him of jurisdiction to try and determine the case, under all the rules of the common law, and it is more than doubtful whether a statute extending such jurisdiction to a court or other tribunal would stand the test of judicial investigation. See *Cooley's Const. Lim.*, p. 508, et seq.

The receiver in this case seems to have been the managing officer in this one sided investigation, for he attests the signatures of twelve out of the fifteen witnesses produced and sworn.

There are two questions of practice raised in the record.

It is insisted by claimant's counsel that the motion for review should not be entertained, because not made within thirty days of notice of the decision, contestant claiming that it was made within thirty days of legal notice of the same; that the first notice of the decision was served upon counsel resident in this city, and was not accompanied with a copy of the decision; that afterwards contestant's counsel in Denver was served with a notice of the decision, with a copy thereof attached.

The motion for review was filed within thirty days after receipt of the last notice, but not within thirty days after receipt of the former.

It is not necessary to decide this question, because there is an affi-

davit of newly discovered evidence, and although a new hearing is not asked for, in my opinion complete justice can only be suberved by ordering a new hearing to be had. Where a new hearing is ordered, there is no provision as to the time within which a motion should be filed therefor. I shall regard the affidavit of new evidence in the light of an application for a new trial.

Counsel for Weed also claim that the contestant has lost his rights under such an application, because he did not move for a new trial immediately upon the discovery of the new evidence, and cite some decisions of this Department showing that this should be done timely.

This of necessity is within the discretion of the Department, and where, as in this case, the new evidence is in the nature of a record, or, at least, not dependent upon the memory of witnesses, the time within which it is presented is not very material.

I am aware that if this entry should be canceled, many titles may be disturbed, and doubtless some innocent purchasers would suffer, but I can not allow the decision of this Department to stand without further investigation, in view of the very doubtful, and even suspicious, record before me.

You will therefore direct that a new hearing be had, with proper notice to interested parties. Emblen will be allowed to be present, with counsel, if he desires, and this Department will detail a competent and efficient agent to represent the interests of the government in said hearing.

CHEROKEE OUTLET—CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., September 1, 1893.

Registers and Receivers, PERRY, ENID, ALVA and WOODWARD,
Oklahoma Territory.

GENTLEMEN: Your attention is called to the President's proclamation of August 19, 1893 (copy herewith) which fixes the hour of twelve o'clock noon, central standard time, Saturday, September sixteenth, 1893, as the time when the lands in the Cherokee Outlet will be opened to settlement and entry under the provisions of the act of March 3, 1893 (27 Stat., 612), and the statutes therein cited and thereby made applicable in the disposal of said lands, and your offices have been established for the disposal thereof, accordingly.

These lands have been surveyed, and you will be supplied with the township plats, tract books, blank forms, official circulars, and other requirements for the proper transaction of your business in connection therewith.

You will observe that certain tracts are excepted in the President's proclamation from settlement and entry because of reservations for

certain purposes as therein indicated; and a notice will be issued prior to the date of the opening setting forth the tracts which have been selected or allotted to citizens of the Cherokee Nation and members of the Pawnee and Tonkawa tribes of Indians. You will allow no entries for any of the tracts covered by such reservations, selections or allotments.

As the rules and regulations governing settlement upon and entry of said lands are set forth in detail in the said proclamation, it is deemed unnecessary to repeat them, but you are directed to inform yourselves fully in regard thereto, and be guided thereby.

You will notice that the proclamation provides for the issuance of certificates to parties after certain declarations covering their qualifications have been made by them, at certain booths, and each party will be required to surrender the certificate held by him, when he files his application for homestead entry, or soldier's declaratory statement.

You will reject any homestead application or declaratory statement presented by a party not holding a certificate before the day upon which the booths are discontinued, due notice of which day will be given you, and, also any application filed at any time by a party claiming settlement before the day of the discontinuance of said booths unless the same is accompanied by such certificate.

If, however, any person claims to have received a certificate at one of said booths and lost the same, you will require him to make a statement under oath setting forth the day when, and the location of the booth where he received such certificate, and the number of the same if possible. You will then suspend action upon said application and call upon this office for a statement as to whether such certificate was issued, upon receipt of which you will act upon the application in the light of such statement.

In order that all of the papers required in homestead entries, and soldiers' declaratory statements may be filed before the claim is put of record, and much future correspondence thus avoided, I deem it advisable to particularly call your attention to the following requirements which past experience has shown to be frequently overlooked when a large body of land is thrown open to settlement.

1. Each homestead applicant who is foreign born must file with his application record evidence of his naturalization, or of his declaration of intention to become a citizen as the case may be. See paragraph 23, page 65, General Circular of February 6, 1892.

2. Each soldier's declaratory statement, whether made in person or by agent, must be accompanied by the soldier's affidavit, form 4-102 b. See pages 71 and 214 of the General Circular of February 6, 1892.

3. Each agent appearing to file a declaratory statement for a soldier will be required to make affidavit that he did not enter upon or occupy any portion of the lands open to settlement prior to the date fixed in the President's proclamation as the day when said lands will be opened

to settlement and entry. See *Guthrie Townsite v. Paine et al.*, 12 L. D., 653.

Your attention is called to the acts of Congress of July 4, 1884, (23 Stat., 73), March 2, 1887 (24 Stat., 446), June 27, 1890 (26 Stat., 81), September 26, 1890 (26 Stat., 485), and February 3, 1892 (27 Stat., 2), granting rights of way to certain railroads crossing the Cherokee Outlet

As near as can be determined from the data available at this time, the following tracts of land are crossed by said rights of way and you will make the proper notes upon your records in order that parties desiring to enter said tracts may know that they may be found subject to the said rights of way.

As some of the approved right of way maps were made without proper reference to the subdivisional lines of the public surveys, it may be that some of the tracts named are not affected by the rights of way, but you will, as soon as practicable, be furnished with maps showing the exact routes of the several railroads and the lands affected by the rights of way.

You will understand that the naming of the tracts herein will not affect in any way the rights of the railroads or settlers under the acts referred to, but the same will be adjudicated in accordance with said laws upon the facts as they are found to be, without regard to the list of lands herein given, as said list is furnished, only, with a view to giving proposed settlers information, as nearly accurate as is possible at this time, in reference to any easements that will affect the lands they may enter.

Hutchinson & Southern Railroad.

$E\frac{1}{2}$ & $NW\frac{1}{4}$ Sec. 6, $NE\frac{1}{4}$ & $SW\frac{1}{4}$ Sec. 7, $SW\frac{1}{4}$ Sec. 8, $E\frac{1}{2}$ & $NW\frac{1}{4}$ Sec. 17, $NE\frac{1}{4}$ Sec. 20, $W\frac{1}{2}$ Sec. 21, $NW\frac{1}{4}$ & $SE\frac{1}{4}$ Sec. 28, $E\frac{1}{2}$ Sec. 33 and $SW\frac{1}{4}$ Sec. 34, T. 20 N., R. 4 W.

$W\frac{1}{2}$ Sec. 6, $W\frac{1}{2}$ Sec. 7, $W\frac{1}{2}$ Sec. 18, $W\frac{1}{2}$ Sec. 19, and all of sections 30 & 31, T. 21 N., R. 4 W.

$SW\frac{1}{4}$ Sec. 2, $E\frac{1}{2}$ Sec. 3, $W\frac{1}{2}$ Sec. 11, $W\frac{1}{2}$ Sec. 14, $W\frac{1}{2}$ & $SE\frac{1}{4}$ Sec. 23, $W\frac{1}{2}$ Sec. 25, $NE\frac{1}{4}$ Sec. 26, and $E\frac{1}{2}$ & $NW\frac{1}{4}$ Sec. 36, T. 22 N., R. 5 W.

$E\frac{1}{2}$ Sec. 3, $E\frac{1}{2}$ Sec. 10, $E\frac{1}{2}$ Sec. 15, $E\frac{1}{2}$ Sec. 22, $E\frac{1}{2}$ Sec. 27, and $E\frac{1}{2}$ Sec. 34, T. 23 N., R. 5 W.

$W\frac{1}{2}$ Sec. 5, $S\frac{1}{2}$ & $NW\frac{1}{4}$ Sec. 8, $SW\frac{1}{4}$ Sec. 16, $E\frac{1}{2}$ Sec. 17, $S\frac{1}{2}$ & $NW\frac{1}{4}$ Sec. 21, $SW\frac{1}{4}$ Sec. 27, $E\frac{1}{2}$ Sec. 28 and $E\frac{1}{2}$ & $NW\frac{1}{4}$ Sec. 34, T. 24 N., R. 5 W.

All Sec. 6, all Sec. 7, $E\frac{1}{2}$ Sec. 18, $E\frac{1}{2}$ Sec. 19, $E\frac{1}{2}$ Sec. 30 and $W\frac{1}{2}$ Sec. 32, T. 25 N., R. 5 W.

$W\frac{1}{2}$ Sec. 30 and $W\frac{1}{2}$ Sec. 31, T. 26 N., R. 5 W.

$NW\frac{1}{4}$ & $S\frac{1}{2}$ Sec. 2, $NE\frac{1}{4}$ Sec. 11, $W\frac{1}{2}$ Sec. 12, $W\frac{1}{2}$ Sec. 13, $W\frac{1}{2}$ & $SE\frac{1}{4}$ Sec. 24, and $NE\frac{1}{4}$ Sec. 25, T. 26 N., R. 6 W.

$SW\frac{1}{4}$ Sec. 6, $NW\frac{1}{4}$ & $E\frac{1}{2}$ Sec. 7, $SW\frac{1}{4}$ Sec. 8, $SE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 17, $NE\frac{1}{4}$

Sec. 20, $W\frac{1}{2}$ and $SE\frac{1}{4}$ Sec. 21, $W\frac{1}{2}$ Sec. 27, $NE\frac{1}{4}$ Sec. 28 and $E\frac{1}{2}$ & $NW\frac{1}{4}$ Sec. 34, T. 27 N., R. 6 W.

$E\frac{1}{2}$ Sec. 1, T. 27 N., R. 7 W.

Chicago, Rock Island & Pacific Railroad.

$NW\frac{1}{4}$ Sec. 4, $E\frac{1}{2}$ Sec. 5, $SE\frac{1}{4}$ Sec. 7, $W\frac{1}{2}$ Sec. 8, $E\frac{1}{2}$ $SW\frac{1}{4}$ Sec. 18, and $W\frac{1}{2}$ Sec. 19, T. 28 N., R. 4 W.

$E\frac{1}{2}$ Sec. 15, $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 22, $NW\frac{1}{4}$ Sec. 27, $E\frac{1}{2}$ Sec. 28, and $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 33, T. 29 N., R. 4 W.

$NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 5, $SE\frac{1}{4}$ Sec. 6, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 7, and $W\frac{1}{2}$ Sec. 18, T. 26 N., R. 5 W.

$E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 2, $E\frac{1}{2}$ Sec. 10, $NW\frac{1}{4}$ Sec. 11, $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 15, $E\frac{1}{2}$ Sec. 21, $NW\frac{1}{4}$ Sec. 22, $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 28, $E\frac{1}{2}$ Sec. 32 and $NW\frac{1}{4}$ Sec. 33, T. 27 N., R. 5 W.

$SE\frac{1}{4}$ Sec. 24, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 25, $SE\frac{1}{4}$ Sec. 35 and $W\frac{1}{2}$ Sec. 36, T. 28 N., R. 5 W.

$W\frac{1}{2}$ Sec. 7, $W\frac{1}{2}$ Sec. 18, and $W\frac{1}{2}$ Sec. 19, T. 20 N., R. 6 W.

$W\frac{1}{2}$ Sec. 5, $E\frac{1}{2}$ Sec. 7, $NW\frac{1}{4}$ Sec. 8, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 18, $W\frac{1}{2}$ Sec. 19 and $W\frac{1}{2}$ Sec. 30, T. 22 N., R. 6 W.

$NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 4, $W\frac{1}{2}$ Sec. 9, $W\frac{1}{2}$ Sec. 16, $SE\frac{1}{4}$ Sec. 17, $E\frac{1}{2}$ Sec. 20, $E\frac{1}{2}$ Sec. 29 and $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 32, T. 23 N., R. 6 W.

$E\frac{1}{2}$ Sec. 3, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 10, $W\frac{1}{2}$ Sec. 15, $SE\frac{1}{4}$ Sec. 21, $W\frac{1}{2}$ Sec. 22, $E\frac{1}{2}$ Sec. 28 and $E\frac{1}{2}$ Sec. 33, T. 24 N., R. 6 W.

$W\frac{1}{2}$ Sec. 1, $E\frac{1}{2}$ Sec. 11, $NW\frac{1}{4}$ Sec. 12, $E\frac{1}{2}$ Sec. 14, $E\frac{1}{2}$ and $SW\frac{1}{4}$ Sec. 23, $W\frac{1}{2}$ Sec. 26, $SE\frac{1}{4}$ Sec. 34 and $W\frac{1}{2}$ Sec. 35, T. 25 N., R. 6 W.

$SE\frac{1}{4}$ Sec. 13, $E\frac{1}{2}$ Sec. 24, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 25 and $W\frac{1}{2}$ Sec. 26, T. 26 N., R. 6 W.

$E\frac{1}{2}$ Sec. 1, $NE\frac{1}{4}$ Sec. 12, $SE\frac{1}{4}$ Sec. 24, $E\frac{1}{2}$ Sec. 25 and $E\frac{1}{2}$ Sec. 36, T. 20 N., R. 7 W.

$E\frac{1}{2}$ Sec. 1, $E\frac{1}{2}$ Sec. 12, $E\frac{1}{2}$ Sec. 13, $E\frac{1}{2}$ Sec. 24, $E\frac{1}{2}$ Sec. 25 and $E\frac{1}{2}$ Sec. 36, T. 21 N., R. 7 W.

$E\frac{1}{2}$ Sec. 25 and $E\frac{1}{2}$ Sec. 36, T. 22 N., R. 7 W.

Atchison, Topeka & Santa Fe Main Line.

$NW\frac{1}{4}$ Sec. 5, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 6, and $NW\frac{1}{4}$ Sec. 7, T. 21 N., R. 1 E.

$E\frac{1}{2}$ Sec. 3, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 10, $W\frac{1}{2}$ Sec. 15, $W\frac{1}{2}$ Sec. 22, $W\frac{1}{2}$ Sec. 27, $E\frac{1}{2}$ Sec. 28, and $E\frac{1}{2}$ Sec. 33, T. 26 N., R. 2 E.

$W\frac{1}{2}$ Sec. 1, $W\frac{1}{2}$ Sec. 12, $W\frac{1}{2}$ Sec. 13, $SE\frac{1}{4}$ Sec. 23, $W\frac{1}{2}$ Sec. 24, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 26, and $W\frac{1}{2}$ Sec. 35, T. 27 N., R. 2 E.

$E\frac{1}{2}$ Sec. 2, $E\frac{1}{2}$ Sec. 11, $E\frac{1}{2}$ Sec. 14, $E\frac{1}{2}$ Sec. 23, $E\frac{1}{2}$ Sec. 26, $NE\frac{1}{4}$ Sec. 35 and $W\frac{1}{2}$ Sec. 36, T. 28 N., R. 2 E.

$W\frac{1}{2}$ Sec. 13, $W\frac{1}{2}$ Sec. 24, $W\frac{1}{2}$ Sec. 25, $SE\frac{1}{4}$ Sec. 26 and $E\frac{1}{2}$ Sec. 35, T. 29 N., R. 2 E.

$W\frac{1}{2}$ Sec. 4, $SE\frac{1}{4}$ Sec. 5, $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 8, $NW\frac{1}{4}$ Sec. 17, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 18 and $W\frac{1}{2}$ Sec. 19, T. 20 N., R. 1 W.

$E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 12, $NW\frac{1}{4}$ Sec. 13, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 14, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 22, $NW\frac{1}{4}$ Sec. 23, $W\frac{1}{2}$ Sec. 27, $SE\frac{1}{4}$ Sec. 28, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 33 and $NW\frac{1}{4}$ Sec. 34, T. 21 N., R. 1 W.

$SE\frac{1}{4}$ Sec. 24, $E\frac{1}{2}$ Sec. 25, and $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 36, T. 20 N., R. 2 W.

Atchison, Topeka & Santa Fe Pan Handle Division.

$W\frac{1}{2}$ Sec. 16, $SE\frac{1}{4}$ Sec. 17, $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 20, $NW\frac{1}{4}$ Sec. 29, $E\frac{1}{2}$ Sec. 30 and $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 31, T. 29 N., R. 12 W.

$W\frac{1}{2}$ Sec. 4, $SE\frac{1}{4}$ Sec. 5, $SE\frac{1}{4}$ Sec. 7, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 8, and $N\frac{1}{2}$ Sec. 18, T. 27 N., R. 13 W.

$E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 1, $E\frac{1}{2}$ Sec. 11, $NW\frac{1}{4}$ Sec. 12, $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 14, $E\frac{1}{2}$ Sec. 22, $NW\frac{1}{4}$ Sec. 23, $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 27, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 33 and $NW\frac{1}{4}$ Sec. 34, T. 28 N., R. 13 W.

$SW\frac{1}{4}$ & $N\frac{1}{2}$ Sec. 13, $SW\frac{1}{4}$ Sec. 14, $S\frac{1}{2}$ Sec. 15, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 21, $NW\frac{1}{4}$ Sec. 22, $N\frac{1}{2}$ Sec. 23, $NW\frac{1}{4}$ Sec. 28, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 29, $SE\frac{1}{4}$ Sec. 30 and $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 31, T. 27 N., R. 14 W.

$NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 4, $SE\frac{1}{4}$ Sec. 5, $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 8, $NW\frac{1}{4}$ Sec. 17, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 18 and $W\frac{1}{2}$ Sec. 19, T. 25 N., R. 15 W.

$NW\frac{1}{4}$ Sec. 1, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 2, $E\frac{1}{2}$ Sec. 10, $NW\frac{1}{4}$ Sec. 11, $E\frac{1}{2}$ Sec. 15, $E\frac{1}{2}$ Sec. 22, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 27, $E\frac{1}{2}$ Sec. 33 and $NW\frac{1}{4}$ Sec. 34, T. 26 N., R. 15 W.

$S\frac{1}{2}$ Sec. 36, T. 27 N., R. 15 W.

$N\frac{1}{2}$ Sec. 6, T. 23 N., R. 16 W.

$NW\frac{1}{4}$ Sec. 2, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 3, $SE\frac{1}{4}$ Sec. 7, $S\frac{1}{2}$ Sec. 8, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 9, $N\frac{1}{2}$ Sec. 10, $E\frac{1}{2}$ Sec. 18, $E\frac{1}{4}$ Sec. 19, $E\frac{1}{2}$ Sec. 30 and $E\frac{1}{4}$ & $NW\frac{1}{4}$ Sec. 31, T. 24 N., R. 16 W.

$E\frac{1}{2}$ Sec. 24, $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 25, $E\frac{1}{2}$ Sec. 35 and $NW\frac{1}{4}$ Sec. 36, T. 25 N., R. 16 W.

$N\frac{1}{2}$ Sec. 1, $NE\frac{1}{4}$ Sec. 2, $N\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 3, $S\frac{1}{2}$ Sec. 4, $E\frac{1}{2}$ Sec. 8, $NW\frac{1}{4}$ Sec. 9, all of Sec. 17, all of Sec. 19, and $NW\frac{1}{4}$ Sec. 20, T. 23 N., R. 17 W.

$SE\frac{1}{4}$ Sec. 32 and $S\frac{1}{2}$ Sec. 33, T. 24 N., R. 17 W.

$SE\frac{1}{4}$ Sec. 19, $S\frac{1}{2}$ Sec. 20, $S\frac{1}{2}$ Sec. 21, $S\frac{1}{2}$ Sec. 22, $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 23, $E\frac{1}{2}$ & $NW\frac{1}{4}$ Sec. 24, $N\frac{1}{2}$ Sec. 29, and $N\frac{1}{2}$ Sec. 30, T. 23 N., R. 18 W.

$N\frac{1}{2}$ Sec. 25, $N\frac{1}{2}$ Sec. 26, $N\frac{1}{2}$ Sec. 27, $N\frac{1}{2}$ Sec. 28, $N\frac{1}{2}$ Sec. 29, and $N\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 30, T. 23 N., R. 19 W.

All of Sec. 25, $S\frac{1}{2}$ Sec. 26, $S\frac{1}{2}$ Sec. 27, $S\frac{1}{2}$ Sec. 28, $S\frac{1}{2}$ Sec. 29 and $S\frac{1}{2}$ Sec. 30, T. 23 N., R. 20 W.

All of Sec. 25, $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 26, $S\frac{1}{2}$ Sec. 27, $S\frac{1}{2}$ Sec. 28, $S\frac{1}{2}$ Sec. 29, $S\frac{1}{2}$ Sec. 30, $NW\frac{1}{4}$ Sec. 31, $NE\frac{1}{4}$ Sec. 32 and $NW\frac{1}{4}$ Sec. 33, T. 23 N., R. 21 W.

$N\frac{1}{2}$ Sec. 3, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 4, $SE\frac{1}{4}$ Sec. 5, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 7, $N\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 8 and $NW\frac{1}{4}$ Sec. 18, T. 22 N., R. 22 W.

$SE\frac{1}{4}$ Sec. 34, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 35 and $N\frac{1}{2}$ Sec. 36, T. 23 N., R. 22 W.

$NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 13, $S\frac{1}{2}$ Sec. 14, $S\frac{1}{2}$ Sec. 21, $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 22, $NW\frac{1}{4}$ Sec. 23, $NW\frac{1}{4}$ Sec. 28, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 29, $SE\frac{1}{4}$ Sec. 30, and $NE\frac{1}{4}$ Sec. 31, T. 22 N., R. 23 W.

$N\frac{1}{2}$ Sec. 2, $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 3, $SE\frac{1}{4}$ Sec. 4, $S\frac{1}{2}$ Sec. 8, $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 9, $NW\frac{1}{4}$ Sec. 10, $NW\frac{1}{4}$ Sec. 17 and $N\frac{1}{2}$ Sec. 18, T. 21 N., R. 24 W.

$SE\frac{1}{4}$ Sec. 35, and $E\frac{1}{2}$ & $SW\frac{1}{4}$ Sec. 36, T. 22 N., R. 24 W.

$W\frac{1}{2}$ Sec. 6, T. 20 N., R. 25 W.

All of Sec. 13, $S\frac{1}{2}$ Sec. 14, $SE\frac{1}{4}$ Sec. 15, $SE\frac{1}{4}$ Sec. 20, all Sec. 21, $N\frac{1}{2}$ Sec. 22, $NW\frac{1}{4}$ Sec. 23, $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 29, $E\frac{1}{2}$ Sec. 31 and $NW\frac{1}{4}$ Sec. 32, T. 21 N., R. 25 W.

$E\frac{1}{4}$ Sec. 1, all Sec. 12, $NW\frac{1}{4}$ Sec. 13, $E\frac{1}{2}$ Sec. 14, $NE\frac{1}{4}$ & $W\frac{1}{2}$ Sec. 23, $NW\frac{1}{4}$ Sec. 26, all Sec. 27, $SE\frac{1}{4}$ Sec. 33 & $W\frac{1}{2}$ Sec. 34, T. 20 N., R. 26 W.

It is thought that the foregoing, together with the circulars with which you will be furnished and the President's proclamation, will be sufficient for your guidance in the duties with which you are charged, but should unforeseen difficulties arise you will submit the same for consideration.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved,

JNO. M. REYNOLDS,
Acting Secretary.

[CHEROKEE OUTLET.]

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA:

A PROCLAMATION.

Whereas, pursuant to section ten, of the act of Congress approved March third, eighteen hundred and ninety-three, entitled "An act making appropriations for current and contingent expenses, and fulfilling treaty stipulations with Indian tribes, for fiscal year ending June thirtieth, eighteen hundred and ninety-four" the Cherokee Nation of Indians, by a written agreement made on the seventeenth day of May, eighteen hundred and ninety-three, has ratified the agreement for the cession of certain lands, hereinafter described, as amended by said act of March third, eighteen hundred and ninety-three, and thereby ceded, conveyed, transferred, relinquished and surrendered all its title, claim, and interest of every kind and character in and to that part of the Indian Territory bounded on the west by the one hundredth degree (100°) of west longitude; on the north by the State of Kansas; on the east by the ninety-sixth degree (96°) of west longitude; and on the south by the Creek Nation, the Territory of Oklahoma and the Cheyenne and Arapahoe Reservation created or defined by Executive order dated August tenth, eighteen hundred and sixty-nine: *Provided*, That any citizen of the Cherokee Nation, who, prior to the first day of November, eighteen hundred and ninety-one, was a bona fide resident upon

and further had, as a farmer and for farming purposes, made permanent and valuable improvements upon any part of the land so ceded and who has not disposed of the same, but desires to occupy the particular lands so improved as a homestead and for farming purposes, shall have the right to select one-eighth of a section of land, to conform however to the United States surveys; such selection to embrace, as far as the above limitation will admit, such improvements. The wife and children of any such citizen shall have the same right of selection that is above given to the citizen, and they shall have the preference in making selections to take any lands improved by the husband and father that he can not take until all of his improved land shall be taken; and that any citizen of the Cherokee Nation not a resident within the land so ceded, who, prior to the first day of November, eighteen hundred and ninety-one, had for farming purposes made valuable and permanent improvements upon any of the land so ceded, shall have the right to select one-eighth of a section of land to conform to the United States surveys; such selection to embrace, as far as the above limitation will admit, such improvements; but the allotments so provided for shall not exceed seventy (70) in number, and the land allotted shall not exceed five thousand and six hundred (5,600) acres; and such allotments shall be made and confirmed under such rules and regulations as shall be prescribed by the Secretary of the Interior, and when so made and confirmed shall be conveyed to the allottees respectively by the United States in fee simple, and from the price to be paid to the Cherokee Nation for the cession so made there shall be deducted the sum of one dollar and forty cents (\$1.40) for each acre so taken in allotment: *And provided* That D. W. Bushyhead, having made permanent or valuable improvements prior to the first day of November, eighteen hundred and ninety-one, on the lands so ceded, he may select a quarter section of the lands ceded, whether reserved or otherwise, prior to the opening of said lands to public-settlement; but he shall be required to pay for such selection, at the same rate per acre as other settlers, into the Treasury of the United States in such manner as the Secretary of the Interior shall direct; and

Whereas, it is provided in section ten of the aforesaid act of Congress, approved March third, eighteen hundred and ninety-three:

That "said lands, except the portion to be allotted as provided in said agreement, shall, upon the payment of the sum of two hundred and ninety-five thousand seven hundred and thirty-six dollars, herein appropriated, to be immediately paid, become and be taken to be and treated as a part of the public domain. But in any opening of the same to settlement, sections sixteen and thirty-six in each township, whether surveyed or unsurveyed, shall be, and are hereby reserved for the use and benefit of the public schools to be established within the limits of such lands, under such conditions and regulations as may be hereafter enacted by Congress. * * *

"Sections thirteen, fourteen, fifteen, sixteen, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-

eight and the east half of sections seventeen, twenty and twenty-nine, all in township numbered twenty-nine north, of range numbered two east of the Indian meridian, the same being lands reserved by Executive order dated July twelfth, eighteen hundred and eighty-four, for use of and in connection with the Chilocco Indian Industrial School, in the Indian Territory, shall not be subject to public settlement, but shall until the further action of Congress, continue to be reserved for the purposes for which they were set apart in the said Executive order. And the President of the United States, in any order or proclamation which he shall make for the opening of the lands for settlement, may make such other reservations of lands for public purposes as he may deem wise and desirable.

"The President of the United States is hereby authorized, at any time within six months after the approval of this act and the acceptance of the same by the Cherokee Nation as herein provided, by proclamation, to open to settlement any or all of the lands not allotted or reserved, in the manner provided in section thirteen of the act of Congress approved March second, eighteen hundred and eighty-nine, entitled 'An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and ninety, and for other purposes' (Twenty-fifth United States Statutes, page ten hundred and five); and also subject to the provisions of the act of Congress approved May second, eighteen hundred and ninety, entitled 'An act to provide a temporary government for the Territory of Oklahoma to enlarge the jurisdiction of the United States court in the Territory, and for other purposes'; also, subject to the second proviso of section seventeen, the whole of section eighteen of the act of March third, eighteen hundred and ninety-one, entitled 'An act making appropriations for the current expenses of the Indian Department, and for fulfilling treaty stipulations with various tribes, for the year ending June thirtieth, eighteen hundred and ninety two, and for other purposes'; except as to so much of said acts and sections as may conflict with the provisions of this act. Each settler on the lands so to be opened to settlement as aforesaid shall, before receiving a patent for his homestead, pay to the United States for the lands so taken by him, in addition to the fees provided by law, the sum of two dollars and fifty cents per acre for any land east of ninety-seven and one-half degrees west longitude, the sum of one dollar and a half per acre for any land between ninety-seven and one-half degrees west longitude and ninety-eight and one half degrees west longitude, and the sum of one dollar per acre for any land west of ninety-eight and one-half degrees west longitude, and shall also pay interest upon the amount so to be paid for said land from the date of entry to the date of final payment therefor at the rate of four per centum per annum.

"No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement; and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands. The Secretary of the Interior shall, under the direction of the President, prescribe rules and regulations, not inconsistent with this act, for the occupation and settlement of said lands, to be incorporated in the proclamation of the President, which shall be issued at least twenty days before the time fixed for the opening of said lands;" and

Whereas, by a written agreement, made on the twenty-first day of October, eighteen hundred and ninety one, the Tonkawa tribe of Indians, in the Territory of Oklahoma, ceded, conveyed, and forever relinquished to the United States all their right, title, claim and interest of every kind and character, in and to the lands particularly described in Article I of the agreement, *Provided*, That the allotments of land to said Tonkawa tribe of Indians theretofore made, or to be made under said agreement and the provisions of the general allotment act approved February eighth, eighteen hundred and eighty-seven and an act amendatory thereof, approved February twenty-eighth, eighteen hundred and ninety-one, shall be confirmed, *And provided*, That in all cases where the allottee has died since land has been set off and scheduled to such person, the law of descent and partition in force in Oklahoma Territory shall apply thereto, any existing law to the contrary notwithstanding; and

Whereas, by a certain other agreement with the Pawnee tribe of Indians, in said Territory, made on the twenty-third day of November, eighteen hundred and ninety-two, said tribe ceded, conveyed, released, relinquished, and surrendered to the United States all its title, claim, and interest, of every kind and character, in and to the lands particularly described in Article I of the agreement, *Provided*, That the allotments made or to be made to said Indians in the manner and subject to the conditions contained in said agreement, shall be confirmed; and

Whereas, it is provided in section thirteen of the act of Congress, accepting, ratifying and confirming said agreements with the Tonkawa Indians and Pawnee Indians, specified in sections eleven and twelve of the same act, approved March third, eighteen hundred and ninety-three, entitled "An act making appropriations for current and contingent expenses, and fulfilling treaty stipulations with Indian tribes for fiscal year ending June thirtieth, eighteen hundred and ninety-four,"

"That the lands acquired by the agreements specified in the two preceding sections are hereby declared to be a part of the public domain. Sections sixteen and thirty-six in each township, whether surveyed or unsurveyed, are hereby reserved from settlement for the use and benefit of public schools, as provided in section ten relating to lands acquired from the Cherokee Nation of Indians. And the lands so acquired by the agreements specified in the two preceding sections not so reserved shall be opened to settlement by proclamation of the President at the same time and in the manner and subject to the same conditions and regulations provided in section ten relating to the opening of the lands acquired from the Cherokee Nation of Indians. And each settler on the lands so to be opened as aforesaid shall, before receiving a patent for his homestead, pay to the United States for the lands so taken by him, in addition to the fees provided by law, the sum of two dollars and fifty cents per acre; and shall also pay interest upon the amount so to be paid for said land from the date of entry to the date of final payment at the rate of four per centum per annum"; and

Whereas, the thirteenth section of the act approved March second, eighteen hundred and eighty-nine, the act approved May second, eighteen hundred and ninety, and the second proviso of section seventeen, and the whole of section eighteen of the act approved March third, eighteen hundred and ninety-one, are referred to in the tenth section of the act approved March third, eighteen hundred and ninety-three, and thereby made applicable in the disposal of the lands in the "Cherokee Outlet" hereinbefore mentioned, the provisions of which acts, so far as they affect the opening to settlement and the disposal of said lands, are more particularly set forth hereinafter in connection with the rules and regulations prescribed by the Secretary of the Interior for the occupation and settlement of the lands hereby opened, according to said tenth section; and,

Whereas, the lands acquired by the three several agreements hereinbefore mentioned have been divided into counties by the Secretary of the Interior, as required by said last-mentioned act of Congress, before the same shall be opened to settlement, and lands have been reserved for county-seat purposes to be entered under sections twenty-three hundred and eighty-seven and twenty-three hundred and eighty-eight of the Revised Statutes of the United States as therein required, as follows, to wit:

For county K, the southeast quarter of section twenty-three and the northeast quarter of section twenty-six, township twenty-eight north, range two east of the Indian meridian, excepting four acres reserved for the site of a court-house to be designated by lot and block upon the official plat of survey of said reservation for county-seat purposes hereafter to be issued by the Commissioner of the General Land Office; said reservation to be additional to the reservations for parks, schools and other public purposes required to be made by section 22, of the act of May 2, 1890.

For county L, the southwest quarter of section one, and the southeast quarter of section two, township twenty-five north, range six west of the Indian meridian, excepting four acres reserved for the site of a court-house to be designated by lot and block upon the official plat of survey of said reservation for county-seat purposes hereafter to be issued by the Commissioner of the General Land Office; said reservation to be additional to the reservations for parks, schools and other public purposes required to be made by section 22, of the act of May 2, 1890.

For county M, the south half of the northeast quarter and the north half of the southeast quarter of section twenty-three, and the south half of the northwest quarter and the north half of the southwest quarter of section twenty-four, township twenty-seven north, range fourteen west of the Indian meridian, excepting one acre reserved for Government use for the site of a land-office, and four acres to be reserved for the site of a court-house, which tracts are to be contiguous and to be

designated by lot and block upon the official plat of survey of said reservation for county-seat purposes, hereafter to be issued by the Commissioner of the General Land Office; said reservations to be additional to the reservations for parks, schools, and other public purposes required to be made by section 22, of the act of May 2, 1890.

For county N, the south half of section twenty-five, township twenty-three north, range twenty-one west of the Indian meridian, excepting one acre reserved for Government use for the site of a land office, and four acres to be reserved for the site of a court-house, which tracts are to be contiguous and to be designated by lot and block upon the official plat of survey of said reservation for county-seat purposes, hereafter to be issued by the Commissioner of the General Land Office; said reservations to be additional to the reservations for parks, schools, and other public purposes required to be made by section 22, of the act of May 2, 1890. *Woodward*

For county O, the southeast quarter of section seven and the southwest quarter of section eight, township twenty-two north, range six west of the Indian meridian, excepting one acre reserved for Government use for the site of a land office, and four acres to be reserved for the site of a court-house, which tracts are to be contiguous and to be designated by lot and block upon the official plat of survey of said reservation for county-seat purposes hereafter to be issued by the Commissioner of the General Land Office; said reservations to be additional to the reservations for parks, schools, and other public purposes required to be made by section 22 of the act of May 2, 1890. *End*

For county P, the northeast quarter of section twenty-two and the northwest quarter of section twenty-three, township twenty-one north, range one west of the Indian meridian, excepting one acre reserved for Government use for the site of a land office, and four acres reserved for the site of a court-house, which tracts are to be contiguous and to be designated by lot and block upon the official plat of survey of said reservation for county-seat purposes hereafter to be issued by the Commissioner of the General Land Office; said reservations to be additional to the reservations for parks, schools, and other public purposes required to be made by section 22, of the act of May 2, 1890; and, *Perry*

For county Q, the southeast quarter of section thirty-one, the west half of the southwest quarter of section thirty-two, township twenty-two north, range five east, lot four of section five, and lot one of section six, township twenty-one north, range five east of the Indian meridian, excepting four acres reserved for the site of a court-house to be designated by lot and block upon the official plat of survey of said reservation for county-seat purposes hereafter to be issued by the Commissioner of the General Land Office; said reservation to be additional to the reservations for parks, schools, and other public purposes required to be made by section 22, of the act of May 2, 1890.

Whereas, it is provided by act of Congress for temporary government

of Oklahoma, approved May second, eighteen hundred and ninety, section twenty-three (Twenty six Statutes, page ninety-two), that there shall be reserved public highways four rods wide between each section of land in said Territory, the section lines being the center of said highways; but no deduction shall be made where cash payments are provided for in the amount to be paid for each quarter section of land by reason in such reservation; and

Whereas, all the terms, conditions, and considerations required by said agreements made with said nation and tribes of Indians and by the laws relating thereto, precedent to opening said lands to settlement, have been, as I hereby declare, complied with:

Now, Therefore, I, Grover Cleveland, President of the United States, by virtue of the power in me vested by the statutes hereinbefore mentioned, and by other the laws of the United States, and by said several agreements, do hereby declare and make known that all the lands acquired from the Cherokee Nation of Indians, the Tonkawa tribe of Indians, and the Pawnee tribe of Indians, by the three several agreements aforesaid, will, at the hour of twelve o'clock noon (central standard time) on Saturday the sixteenth day of the month of September A. D., eighteen hundred and ninety-three, and not before, be opened to settlement under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreements, the statutes above specified, the laws of the United States applicable thereto and the conditions prescribed by this Proclamation, saving and excepting lands described and identified as follows, to wit: The lands set apart for the Osage and Kansas Indians, being a tract of country bounded on the north by the State of Kansas, on the east by the ninety-sixth degree of west longitude, on the south and west by the Creek country and the main channel of the Arkansas River; the lands set apart for the Confederate Otoe and Missouria tribes of Indians, described as follows, to wit: Township twenty-two north, range one east; township twenty-three north, range one east; township twenty-two north, range two east; township twenty-three north, range two east; township twenty-two north, range three east; and that portion of township twenty-three north, range three east, lying west of the Arkansas River; and the lands set apart for the Ponca tribe of Indians, described as follows, to wit: Township twenty-four north, range one east; township twenty-five north, range one east; fractional township twenty-four north, range two east; fractional township twenty-five north, range two east; fractional township twenty-four north, range three east; fractional township twenty-five north, range three east; fractional township twenty-four north, range four east; fractional township twenty-five north, range four east, the said fractional townships lying on the right bank of the Arkansas River, excepting also the lands allotted to the Indians as in said agreements provided, excepting also the lands reserved by Executive

orders dated April eighteenth, eighteen hundred and eighty-two, and January seventeenth, eighteen hundred and eighty-three (known as Camp Supply military reservation), described as follows, to wit: Township twenty-four north, range twenty-two west, the south half of township twenty-five north, range twenty-two west, and the southwest quarter of township twenty-five north, range twenty one west; excepting also one acre of land in each of the reservations for county-seat purposes, in counties M, N, O and P, which tracts are hereby reserved for Government use as sites for land offices, and four acres in each reservation for county-seat purposes hereinbefore named, which tracts are hereby reserved as sites for court-houses, and excepting also the reservations for the use of and in connection with the Chilocco Indian Industrial School, and for county-seat purposes hereinbefore described; excepting also the Saline lands covered by three leases made by the Cherokee Nation prior to March 3, 1893, known as the Eastern, Middle and Western Saline reserves, under authority of the act of Congress of August 7, 1882 (22 Stat., 349), said lands being described and identified as follows: The *Eastern Saline Reserve* embracing all of section 6, lots 3 and 4 of section 4, the south half of the northeast quarter, the south half of the northwest quarter, the north half of the southwest quarter and lots 1, 2, 3 and 4 of section 5, and the northeast quarter of the northwest quarter and lots 1 and 2 of section 7, township 25 north, range 9 west; all of sections 6, 7, 8, 17, 18, 19, 20, 21, 27, 28, 29, 30, 31, 32 and 33, the southwest quarter, the southwest quarter of the northwest quarter and lots 2, 3, 4, 5, 6 and 7 of section 5, the southwest quarter, the southwest quarter of the northwest quarter, the southwest quarter of the southeast quarter, and lot 1 of section 9, the west half of the southwest quarter of section 15, the west half, the southeast quarter, the west half of the northeast quarter and the southeast quarter of the northeast quarter of section 16, the west half, the west half of the southeast quarter and the southeast quarter of the southeast quarter of section 22, the west half, the west half of the southeast quarter, the northeast quarter of the southeast quarter, and the southwest quarter of the northeast quarter of section 26, the northwest quarter, the north half of the southwest quarter, the west half of the northeast quarter, and the northeast quarter of the northeast quarter of section 34, and the northwest quarter of the northwest quarter of section 35, township 26 north, range 9 west; all of section 31, the southwest quarter of the southeast quarter, the southeast quarter of the southwest quarter and lot 4 of section 30, and lots 3 and 4 of section 32, township 27 north, range 9 west; all of sections 1, 2, 3, 4, 9, 10 and 11, the southeast quarter, the south half of the northeast quarter, the east half of the southwest quarter, the southeast quarter of the northwest quarter and lots 1, 2 and 3 of section 5, the east half, the southwest quarter and the east half of the

northwest quarter of section 8, the north half, the north half of the southwest quarter, the southwest quarter of the southwest quarter, and the northwest quarter of the southeast quarter of section 12, the northwest quarter, the northwest quarter of the northeast quarter, the north half of the southwest quarter, and the southwest quarter of the southwest quarter of section 14, the north half, the southeast quarter, and the north half of the southwest quarter of section 15, and the northeast quarter and the north half of the northwest quarter of section 16, township 25 north, range 10 west; all of sections 1, 2, 3, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 28, 33, 34, 35 and 36, the south half of the northeast quarter, the southeast quarter of the northwest quarter, the southeast quarter, the east half of the southwest quarter and lots 1, 2 and 3 of section 4, the east half, the southwest quarter, the east half of the northwest quarter, and the southwest quarter of the northwest quarter of section 9, the southeast quarter of the southeast quarter of section 17, the east half of the northeast quarter and the east half of the southeast quarter of section 20, the southeast quarter and the east half of the northeast quarter of section 29, and the east half and the southeast quarter of the southwest quarter of section 32, of township 26 north, range 10 west; all of sections 22, 26, 27, 34, 35 and 36, the east half of the northeast quarter and the east half of the southeast quarter of section 21, the southwest quarter, the west half of the southeast quarter, the south half of the northwest quarter and lots 1 and 6 of section 23, the southwest quarter, the west half of the southeast quarter, the southeast quarter of the southeast quarter, the south half of the northwest quarter and lot 1 of section 25, the east half of section 28, and the east half and the southeast quarter of the southwest quarter of section 33, township 27 north, range 10 west; the *Middle Saline Reserve* embracing the southwest quarter of the northeast quarter, the southeast quarter of the northwest quarter, the west half of the southeast quarter, the east half of the southwest quarter, and lots 2, 3, 4, 5, 6 and 7 of section 6, and the northwest quarter of the northeast quarter, the northeast quarter of the northwest quarter, and lot 1 of section 7, township 26 north, range 18 west; the southwest quarter of the southeast quarter, the southeast quarter of the southwest quarter and lot 7 of section 6, the west half of the northeast quarter, the east half of the northwest quarter, the west half of the southeast quarter the east half of the southwest quarter and lots 1, 2, 3 and 4 of section 7, the west half of the northeast quarter, the east half of the northwest quarter, the west half of the southeast quarter, the east half of the southwest quarter and lots 1, 2, 3 and 4 of section 18, the west half of the northeast quarter, the east half of the northwest quarter, the west half of the southeast quarter, the east half of the southwest quarter and lots 1, 2, 3 and 4 of section 19, the northwest quarter of the northeast quarter, the northeast quarter of the northwest quarter, and lots 1, 2, 3, 4, 6, 7 and 8 of section 30, and the west half of the northeast

quarter, the east half of the northwest quarter, the west half of the southeast quarter, the east half of the southwest quarter and lots 1, 2, 3 and 4 of section 31, township 27 north, range 18 west; all of sections 1 to 6 inclusive, the north half of the north half of sections 8, 9, 10, 11 and 12, and the north half of the northeast quarter, the northeast quarter of the northwest quarter and lot 1 of section 7, township 26 north, range 19 west; all of sections 7 to 36 inclusive, the south half of the south half of sections 1, 2, 3, 4 and 5, and the south half of the southeast quarter, the southeast quarter of the southwest quarter and lot 7 of section 6, township 27 north, range 19 west; all of sections 1 and 2, the south half of the northeast quarter, the southeast quarter, and lots 1 and 2 of section 3, the north half of the northeast quarter of section 10, and the north half of the north half of sections 11 and 12, township 26 north, range 20 west; all of sections 11, 12, 13, 14, 23, 24, 25, 26, 35 and 36, the south half of the southeast quarter and lot 7 of section 1, the southwest quarter of the southwest quarter and lot 6 of section 2, the south half of the southeast quarter of section 3, and the east half of sections 10, 15, 22, 27 and 34 township 27 north, range 20 west: and the *Western Saline Reserve* embracing all of sections 18, 19, 30 and 31, township 29 north, range 20 west; and all of sections 13, 14, 23, 24, 25, 26, 35 and 36, township 29 north, range 21 west; excepting also that section 13 in each township which has not been otherwise reserved or disposed of, is hereby reserved for university, agricultural college, and normal school purposes, subject to the action of Congress; excepting also that section 33 in each township which has not been otherwise reserved or disposed of, is hereby reserved for public buildings; excepting also sections sixteen and thirty-six in each township which are reserved by law for the use and benefit of the public schools; excepting, also, all selections and allotments made under the law and the agreements herein referred to, the lands covered by said selections and allotments to be particularly described and identified; said descriptions to be furnished by the Commissioner of the General Land Office, and posted in the several booths hereinafter referred to as those where certain preliminary declarations are to be made prior to the day named in this proclamation as that when the strip will be open to settlement.

Said lands so to be opened, as herein proclaimed, shall be entered upon and occupied only in the manner and under the provisions following, to wit:

A strip of land, one hundred feet in width, around and immediately within the outer boundaries of the entire tract of country, to be opened to settlement under this proclamation, is hereby temporarily set apart for the following purposes and uses, viz:

Said strip, the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, shall be open to occupancy in advance of the day and hour

named for the opening of said country, by persons expecting and intending to make settlement pursuant to this proclamation. Such occupancy shall not be regarded as trespass, or in violation of this proclamation, or of the law under which it is made; nor shall any settlement rights be gained thereby.

The Commissioner of the General Land Office shall, under direction of the Secretary of the Interior, establish on said one-hundred-foot strip booths to be located as follows: One in Tp. 29 N., R. 2 E.; one in Tp. 29 N., R. 2 W.; one in Tp. 29 N., R. 4 W.; one in Tp. 29 N., R. 8 W.; one in Tp. 29 N., R. 12 W.; one in Tp. 20 N., R. 3 E.; one in Tp. 20 N., R. 2 W.; one in Tp. 20 N., R. 7 W.; and one in Tp. 20 N., R. 26 W., and shall place in charge thereof three officers to each booth, who shall be detailed from the General Land Office. Said booths shall be open for the transaction of business on and after Monday the eleventh day of the month of September, A. D., eighteen hundred and ninety-three, from 7 a. m. to 12 m. and 1 p. m., to 6 p. m., each business day, until the same shall be discontinued by the Secretary of the Interior, who is hereby authorized to discontinue the same at his discretion. Each party desiring to enter upon and occupy as a homestead any of the lands hereby opened to settlement will be required to first appear at one of the before-mentioned booths and make a declaration in writing to be signed by the party in the presence of one of the officers in charge thereof, which shall be certified by such officer, according to the form hereto attached and made a part hereof (marked A), showing his or her qualifications to make homestead entry for said lands, whereupon a certificate will be issued by the officers in charge of the booth to the party making the declaration, which shall be of the form hereto attached and made a part hereof (marked D).

Where a party desires to file a soldier's declaratory statement in person he will be required to make a declaration which shall be of the form hereto attached and made a part thereof (marked B), the same to be made and subscribed before one of the officers in charge of the booth and certified by such officer, independently of the affidavit (Form 4—546) to be filed when he presents the certificate of Form D, there given him, to the district officers. Where a party desires to file a declaratory statement through an agent, it will be necessary for him previously to make the affidavit ordinarily required (Form 4—545) before some officer authorized to administer oaths, and place the same in the hands of the agent, who, before being permitted to enter upon the lands to be opened in said "Outlet" for the purpose of making the desired filing, will be required to appear before the officers in charge of some one of the booths, to present the said affidavit of the party authorizing him to act as such agent, and to make a declaration in writing to be subscribed by him in the presence of one of such officers, which shall be certified by such officer, according to the form hereto attached and made a part hereof (marked C), whereupon a certificate of Form D will

be given him by said officer. The agent should be provided with affidavits of Form 4—545 made in duplicate—one for presentation to the officers in charge of the booth, and the other for presentation to the district officers, when formal filing is to be made.

Each party desiring to enter upon said lands for the purpose of settling upon a town lot, will be required to first appear at one of the before-mentioned booths, and make a declaration in writing to be signed by the party in the presence of one of the officers in charge thereof, which shall be certified by such officer, according to the form hereto attached and made a part hereof (marked E), whereupon a certificate will be issued by the officers in charge of the booth to the party making the declaration which shall be of the form hereto attached and made a part thereof (marked F).

The said declarations made before the officers in charge shall be given consecutive numbers beginning at number one at each booth and the certificate issued to the party making the declaration shall be given the same number as is given the declaration. The declarations shall be carefully preserved by the officers in charge of the booths, and when the booths are discontinued said declarations shall be transmitted, together with the duplicate affidavits (Form 4—545), hereinbefore required to be presented in case of agents proposing to act for soldiers in filing declaratory statements to the General Land Office for filing as a part of the records pertaining to the disposal of said lands.

The certificate will be evidence only that the party named therein is permitted to go in upon the lands opened to settlement by this proclamation at the time specified herein and the certificate of Form D must be surrendered when application to enter or file is presented to the district officers and the party's right to make a filing, homestead entry or settlement shall be passed upon by the district land officers at the proper time and in the usual manner. The holder of such certificate will be required when he makes his homestead affidavit, or, if a soldier or soldier's agent, when he files a declaratory statement at the district office, to allege under oath before the officer taking such homestead affidavit, or to whom said declaratory statement is presented for filing; that all the statements contained in the declaration made by him, upon which said certificate is based, are true in every particular, such oath to be added to affidavit of Form 4—102, as shown on form hereto attached and made a part hereof (marked 102d).

After the hour and day hereinbefore named when said lands will be opened to settlement, all parties holding such certificates (form D or F), will be permitted to occupy or enter upon the lands so opened, and parties holding a certificate of form D may initiate a homestead claim, either by settlement upon the land or by entry or filing at the proper district office; but no person not holding any such certificate shall be permitted to occupy or enter upon any of said lands until after the booths shall have been discontinued by direction of the Secretary of

the Interior. Until then, the officers of the United States are expressly charged to permit no party without a certificate to occupy or enter upon any of said lands.

The following rules and regulations have been prescribed by the Secretary of the Interior under the direction of the President as provided by section ten of said act of March third, eighteen hundred and ninety-three, for the occupation and settlement of the lands hereby opened, to wit:

The thirteenth section of the act approved March second, eighteen hundred and eighty nine, the act approved May second eighteen hundred and ninety, the second proviso of section seventeen, and the whole of section eighteen of the act approved March third, eighteen hundred and ninety-one, are by section ten of the act of March third, eighteen hundred and ninety-three, made applicable in disposing of the lands under said section ten, and said lands are thereby rendered subject to disposal under the homestead and town-site laws only, with certain modifications, which laws, as so modified, contain provisions, substantially as follows:

1. Any party will be entitled to initiate a homestead claim to a tract of said lands, who is over twenty-one years of age or the head of a family; who is a citizen of the United States, or has declared his intention to become such; who has not exhausted his homestead right either by perfecting a homestead entry for one hundred and sixty acres of land under any law, excepting what is known as the commuted provision of the homestead law, contained in section two thousand three hundred and one of the United States Revised Statutes, or by making or commuting a homestead entry since March second, eighteen hundred and eighty-nine; who has not entered, since August thirty, eighteen hundred and ninety, under the land laws of the United States, or filed upon, a quantity of land, agricultural in character, and not mineral, which with the tracts sought to be entered in any case, would make more than three hundred and twenty acres; who is not the owner in fee simple of one hundred and sixty acres of land in any State or Territory; and who has not entered upon or occupied the lands hereby opened in violation of this the President's proclamation opening the same to settlement and entry. (See section 2289 U. S. R. S.; act of March 2, 1889, 25 Stat., 854; section 13 of the act of March 2, 1889, 25 Stat., 1005; act of August 30, 1890, 26 Stat., 391; section 20, act of May 2, 1890, 26 Stat., 91; and section 10, act of March 3, 1893, 27 Stat., 640).

2. Each entry shall be in a compact body, according to the rectangular subdivisions of the public surveys, and in a square form, as nearly as reasonably practicable, consistently with such surveys, and no person shall be permitted to enter more than one quarter section in quantity of said land. (See section 13, act of March 2, 1889, 25 Stat., 1005.)

3. Parties who own and reside upon land (not acquired by them under the homestead law), not amounting in quantity to a quarter section, may, if otherwise qualified, enter other land lying contiguous to their own to an amount which shall not, with the land already owned by them, exceed in the aggregate 160 acres. (See section 2289, U. S. R. S.).

4. Any party who has made a homestead entry prior to March second, eighteen hundred and eighty-nine, for less than one quarter section of land and who still owns and occupies the land so entered, may, if otherwise qualified, enter an additional tract of land lying contiguous to the land embraced in the original entry, which shall not, with the land first entered, exceed in the aggregate one hundred and sixty acres, but such additional entry will not be permitted, or if permitted will be canceled, if the original entry should fail, for any reason prior to patent, or should appear to be illegal or fraudulent. The final proof of residence and cultivation made on the original entry, together with the payment of the prescribed price for the land, will be sufficient to entitle the party to a final certificate for the land so entered without further proof. (See section 5 of the act of March 2, 1889, 25 Stat., 854.).

5. Parties who have complied with the conditions of the law with regard to a homestead entry for less than one hundred and sixty acres of land made prior to March second, eighteen hundred and eighty-nine, and have had the final papers issued therefor, may, if otherwise qualified, make an additional entry, by legal subdivisions, of so much land as, added to the quantity previously so entered, shall not exceed one hundred and sixty acres. Parties making entry under the provisions set forth in this paragraph will be required to reside upon and cultivate the land embraced therein for the prescribed period and to submit proof of residence and cultivation of a like character with that required in ordinary homestead entries before the issuance of a final certificate. (See section 6, act of March 2, 1889, 25 Stat., 854.).

6. Any officer, soldier, seaman, or marine who served for not less than ninety days in the Army or Navy of the United States during the war of the rebellion and who was honorably discharged and has remained loyal to the Government, or, in case of his death, his widow, or in case of her death or remarriage, his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, may either in person, or by agent, file a declaratory statement for a tract of land and have six months thereafter within which to make actual entry and commence residence and improvements upon the land. (See sections 2304, 2307, and 2309, U. S. R. S.).

7. Every person entitled under the preceding paragraph to enter a homestead, who, or whose deceased husband or father in case of the widow or minor children, may have, prior to June 22, 1874, entered, under the homestead laws, a quantity of land less than 160 acres, may, if otherwise qualified, enter so much land as, when added to the

quantity previously entered, shall not exceed 160 acres, but the party must make affidavit that the entry is made for actual settlement and cultivation, and the proof of such settlement and cultivation, prescribed by existing homestead laws and regulations thereunder, will be required to be produced before the issue of final certificate. (See section 2306 U. S. R. S., and section 18 of the act of May 2, 1890, 26 Stat., 90.).

8. Parties may initiate claims under the homestead law either by settlement on the land or by entry at the district office; in the former case, the party will have three months after settlement within which to file his application for the tract at the district office; in the latter case the party will have six months after entry at that office, within which to establish residence and begin improvements upon the land. (See sections 2290 and 2297, U. S. R. S.; and section 3, of the act of May 14, 1880, 21 Stat., 140.).

9. The homestead affidavits required to be filed with the application must be executed before the register or receiver of the proper district land office (see section 2290, U. S. R. S.), or before any other officer who may be found duly qualified at the time to administer such oaths according to the provisions of the act of Congress of May 26, 1890, 26 Stat., 121.

10. Parties applying to make homestead entry will be required to tender with the application the legal fee and commissions which are as follows: For an entry of over eighty acres a fee of ten dollars, and for an entry of eighty acres or less a fee of five dollars, and, in both cases, in addition, commissions, of two per cent upon the Government price of the land, computed at the rate of \$1.25 per acre, the ordinary minimum price of public lands under the general provisions of section 2357, U. S. R. S. (See sections 2238 and 2290, U. S. R. S.)

11. Homestead applicants appearing in great number at the local office to make entry at the time of opening will be required to form in line in order that their applications may be presented and acted upon in regular order.

12. Soldiers' declaratory statements can only be made by the parties entitled or by their agents in person, and will not be received if sent by mail. A party acting as agent and appearing in line, as contemplated under the eleventh paragraph, will be allowed to make one entry or filing in his individual character, if he so desires, and to file one declaratory statement in his representative character as agent, if such he shall be, and thereupon he shall be required to step out of line, giving place to the next person in order, and, if he desires to make any other filings, to take his place at the end of the line and await his proper turn before doing so, and thus to proceed in order until all the filings desired by him shall be made.

13. Section two thousand three hundred and one of the Revised Statutes of the United States providing for commutation homestead

entries is not applicable to said lands. (See section 18 of the act of May 2, 1890, 26 Stat., 90.)

14. Proof of five years' residence, cultivation, and improvement, and the payment prescribed by the statute, as hereinbefore mentioned must be made, before a party will be entitled to a patent under the homestead law, and such proof is required to be made within seven years from the date of the entry. Commissions equal to two per cent, upon the Government price for the land, computed at \$1.25 per acre under section 2357, U. S. R. S., must also be tendered with the final proof. Interest at four per cent per annum on the purchase price of the land must be paid from the date of the entry to date of final payment of purchase money. (See sections 2238 and 2291, U. S. R. S.; and sections 10 and 13 of the act of March 3, 1893, 27 Stats., 640.)

15. The parties named in paragraph six of these regulations are entitled to have the term of service in the Army or Navy, under which the claim is made, not exceeding four years, deducted from the period of five years' residence or cultivation required as stated in the preceding paragraph, or if the party was discharged from service on account of wounds or disabilities incurred in the line of duty, the whole term of enlistment not exceeding four years, may be deducted. (See section 2305, U. S. R. S.)

16. Where a homestead settler dies before the consummation of his claim the widow, or, in case of her death, the heirs or devisee may continue settlement or cultivation, and obtain title upon requisite proof at the proper time. If the widow proves up, title will pass to her; if she dies before proving up and the heirs or devisee make the proof, the title will vest in them, respectively. (See section 2291, U. S. R. S.)

17. Where both parents die, leaving infant children, the homestead may be sold for cash for the benefit of such children, and the purchaser will receive title from the United States. (See section 2292, U. S. R. S.)

18. In case of the death of a person after having entered a homestead, the failure of the widow, children, or devisee of the deceased to fulfill the demands of the letter of the law as to residence on the lands will not necessarily subject the entry to forfeiture on the ground of abandonment. If the land is cultivated in good faith the law will be considered as having been substantially complied with.

19. Town-site claims may be initiated upon said lands, under the statutes, by two methods, which are separate and distinct in character—the regulations under the first method are hereinafter set forth in paragraphs twenty, twenty-one and twenty-two, and under the second method in paragraphs twenty-three to twenty-eight, inclusive. Provision is further made for town-site entries in cases where lands entered under the homestead law are required for town-site purposes as set forth in paragraph thirty.

20. Parties having founded or who desire to found a city or town on the public lands, must file with the recorder of the county in which

the land is situate a plat thereof, describing the exterior boundaries of the land according to the lines of public surveys. Such plat must state the name of the city or town, exhibit the streets, squares, blocks, lots and alleys, and specify the size of the same, with measurements and area of each municipal subdivision, the lots in which shall not exceed 4,200 square feet, with a statement of the extent and general character of the improvements. The plat and statement must be verified by the oath of the party acting for and in behalf of the occupants and inhabitants of the town or city. Within one month after filing the plat with the recorder of the county a verified copy of said plat and statement must be sent to the General Land Office, accompanied by the testimony of two witnesses that such town or city has been established in good faith, and a similar map and statement must be filed with the register and receiver of the proper district office. Thereafter the President may cause the lots embraced within the limits of such city or town to be offered at public sale to the highest bidder subject to a minimum of ten dollars for each lot; and such lots as may not be disposed of at public sale shall thereafter be liable to private entry at such minimum, or at such reasonable increase or diminution thereafter as the Secretary of the Interior may order from time to time, after at least three months' notice, in view of the increase or decrease in the value of the municipal property. Any actual settler upon any lot and upon any additional lot upon which he may have substantial improvements, shall be entitled to prove up and purchase the same as a préemption, at such minimum, at any time before the day fixed for the public sale. (See section 2382, U. S. R. S.)

21. In case the parties interested shall fail or refuse, within twelve months after founding a city or town, to file in the General Land Office a transcript map, with the statement and testimony, as required in paragraph twenty, the Secretary of the Interior may cause a survey and plat to be made of said city or town, and thereafter the lots will be sold at an increase of fifty per cent, on the minimum price of \$10 per lot. (See section 2384, U. S. R. S.)

22. When lots vary in size from the limitation of 4,200 square feet, and the lots, buildings, and improvements cover an area greater than 640 acres, such variance as to size of lots or excess in area will prove no bar to entry, but the price of the lots may be increased to such reasonable amount as the Secretary of the Interior may by rule establish. (See section 2385, U. S. R. S.)

23. Under the second method lands actually settled upon and occupied as a town site, and therefore not subject to entry under the homestead laws, may be entered as a town site, at the proper district land office. (See section 2387, U. S. R. S.).

24. If the town is incorporated, the entry may be made by the corporate authorities thereof through the mayor or other principal officer duly authorized so to do. If the town is not incorporated, the entry

may be made by the judge of the county court for the county in which said town is situated. In either case the entry must be made in trust for the use and benefit of the occupants thereof, according to their respective interests. The execution of such trust as to the disposal of lots and the proceeds of sales is to be conducted under regulations prescribed by the Territorial laws. Acts of trustees not in accordance with such regulations are void. (See sections 2387 and 2391 U. S. R. S.).

25. The officer authorized to enter a town site may make entry at once, or he may initiate an entry by filing a declaratory statement of the purpose of the inhabitants to make a town-site entry of the land described. The entry or declaratory statement shall include only such land as is actually occupied by the town, and the title to which is in the United States, and its exterior limits must conform to the legal subdivisions of the public lands. (See sections 2388 and 2389 U. S. R. S.)

26. The amount of land that may be entered under this method is proportionate to the number of inhabitants. One hundred and less than two hundred inhabitants may enter not to exceed 320 acres; two hundred and less than one thousand inhabitants may enter not to exceed 640 acres; and where the inhabitants number one thousand and over, an amount not to exceed 1,280 acres may be entered; and for each additional one thousand inhabitants, not to exceed five thousand in all, a further amount of 320 acres may be allowed. When the number of inhabitants of a town is less than one hundred, the town site shall be restricted to the land actually occupied for town purposes by legal subdivisions. (See section 2389, U. S. R. S.)

27. Where an entry is made of less than the maximum quantity of land allowed for town-site purposes, additional entries may be made of contiguous tracts occupied for town purposes, which, when added to the previous entry or entries, will not exceed 2,560 acres; but no additional entry can be allowed which will make the total area exceed the area to which the town may be entitled by virtue of its population at date of additional entry. (See sec. 4 of the act of March 3, 1877, 19 Stat., 392.)

28. The land must be paid for at the Government price per acre, and proof must be furnished relating—1st. To municipal occupation of the land; 2d, Number of inhabitants; 3d, Extent and value of town improvements; 4th, Date when land was first used for town-site purposes; 5th, Official character and authority of officer making entry; 6th, If an incorporated town, proof of incorporation, which should be a certified copy of the act of incorporation; and, 7th, That a majority of the occupants or owners of the lots within the town desire that such action be taken. Thirty days' publication of notice of intention to make proof must be made and proof of publication furnished. (See sec. 2387 U. S. R. S.)

29. All surveys for town sites on said lands shall contain reserva-

tions for parks (of substantially equal area if more than one park) and for schools and other public purposes embracing in the aggregate not less than ten nor more than twenty acres, and patents for such reservations, to be maintained for such purposes, will be issued to the towns respectively when organized as municipalities. (See section 22, act of May 2, 1890, 26 Stat., 92.)

30. In case any of said lands which may be entered under the homestead laws by a person who is entitled to perfect his title thereto under such laws, are required for town-site purposes, the entryman may apply to the Secretary of the Interior to purchase the lands embraced in said homestead or any part thereof not less than a legal subdivision for town-site purposes. The party must file, in the district office with his application; a plat of the proposed town site, and evidence of his qualifications to perfect title under the homestead law, and of his compliance with all the requirements of the law and the instructions thereunder, and must deposit with the Secretary of the Interior the sum of ten dollars per acre for all the lands embraced in such town site, except the lands to be donated and maintained for public purposes as mentioned in the preceding paragraph. (See section 22, act of May 2, 1890, 26 Stat., 92.)

Notice, moreover, is hereby given that it is by law enacted that no person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by this proclamation; and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands, and that the officers of the United States will be required to enforce this provision.

And further notice is hereby given that four land districts have been established in Oklahoma Territory with boundaries as follows:

The Perry district bounded and described as follows: Beginning at the middle of the main channel of the Arkansas River, where the same is intersected by the northern boundary of Oklahoma Territory; thence west to the northwest corner of township 29 north, range 2 west of the Indian meridian; thence south on the range line between ranges 2 and 3 west to the southwest corner of lot 3 of section 31, township 20 north, range 2 west; thence east to the southeast corner of lot 4 of section 36, township 20 north, range 4 east; thence south on the range line between ranges 4 and 5 east to the middle of the main channel of the Cimarron River; thence down said river in the middle of the main channel thereof to the western boundary of the Creek country; thence north to the northwest corner of the Creek country; thence east on the northern boundary of said Creek country to the middle of the main channel of the Arkansas River; thence up said river in the middle of the main channel thereof to the place of beginning; the local land office of which will be located at the town of Perry, in county P.

The Enid district bounded and described as follows: Beginning at

the northeast corner of township 29 north, range 3 west of the Indian meridian; thence west to the northwest corner of township 29 north, range 8 west; thence south on the range line between ranges 8 and 9 west to the southwest corner of lot 3 of section 31, township 20 north, range 8 west; thence east to the southeast corner of lot 4 of section 36, township 20 north, range 3 west; thence north on the range line between ranges 2 and 3 west to the place of beginning; the local land office of which will be located at the town of Enid in county O.

The Alva district, bounded and described as follows: Beginning at the northeast corner of township 29 north, range 9 west of the Indian meridian; thence west to the northwest corner of township 29 north, range 16 west; thence south on the range line between ranges 16 and 17 west to the southwest corner of lot 3 of section 31, township 20 north, range 16 west; thence east to the southeast corner of lot 4 of section 36, township 20 north, range 9 west; thence north on the range line between ranges 8 and 9 west to the place of beginning; the local land office of which will be located at the town of Alva in county M.

The Woodward land district bounded and described as follows: Beginning at the northeast corner of township 29 north, range 17 west of the Indian meridian; thence west to the northwest corner of township 29 north, range 26 west; thence south to the southwest corner of lot 3 of section 32, township 20 north, range 26 west; thence east to the southeast corner of lot 4 of section 36, township 20 north, range 17 west; thence north on the range line between ranges 16 and 17 west to the place of beginning; the local land office of which will be located at the town of Woodward in county N.

And further notice is hereby given that the line of ninety-seven and one-half degrees west longitude, named herein, for the purpose of disposing of the land hereby opened to settlement, is held to fall on the west line of sections two, eleven, fourteen, twenty-three, twenty-six, and thirty-five of the townships in range three west of the Indian meridian, and the line of ninety-eight and one-half degrees of west longitude is held to fall on the line running due north and south through the centres of sections four, nine, sixteen, twenty-one, twenty-eight and thirty-three of the townships in range twelve west of the Indian meridian, and said lines have been so laid down upon the township plats on file in the General Land Office.

In witness whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this nineteenth day of August, in the year of our Lord, one thousand eight hundred and ninety-[SEAL.] three, and of the Independence of the United States, the one hundred and eighteenth.

GROVER CLEVELAND.

By the President:

W. Q. GRESHAM,

Secretary of State.

A.

Declaration required by President's proclamation of August 19th, 1893, preparatory to occupying or entering upon the lands of the Cherokee Outlet, for the purpose of making a homestead entry.

No. —.

BOOTH IN T. — N., R. —, —, 1893.

I, — of —, being desirous of occupying or entering upon the lands opened to settlement by the President's proclamation of August 19, 1893, for the purpose of making a homestead entry, do solemnly swear that I am over twenty-one years of age or the head of a family; that I am a citizen of the United States (or have declared my intention to become such); that I have not perfected a homestead entry for one hundred and sixty acres of land under any law, except what is known as the commuted provision of the homestead law contained in sec. 2301, R. S., nor have I made or commuted a homestead entry since March 2, 1889: _____

that I have not entered since August 30, 1890, under the land laws of the United States or filed upon a quantity of land agricultural in character and not mineral, which, with the tracts now desired would make more than 320 acres; that I am not the owner in fee simple of 160 acres of land in any State or Territory; that I have not entered upon or occupied, nor will I enter upon or occupy, the lands to be opened to settlement by the President's proclamation of August 19th, 1893, in violation of the requirements of said proclamation; that I desire to make entry for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons, or corporation, that I will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land I may select; that I am not acting as agent of any person, corporation, or syndicate, in entering upon said lands, nor in collusion with any person, corporation, or syndicate to give them the benefit of the land I may enter, or any part thereof, or the timber thereon; that I do not apply to enter upon said lands for the purpose of speculation, but in good faith, to obtain a home for myself, and that I have not directly or indirectly made, and will not make, any agreement or contract in any way or manner with any person or persons, corporation or syndicate whatsoever, by which the title which I may acquire from the Government of the United States should inure in whole or in part to the benefit of any person except myself.

I certify that the foregoing declaration was made and subscribed before me this — day of —, 1893.

_____,
Officer in charge.

NOTE.—If the party has made a homestead entry since March 2, 1889, but has failed or is unable to perfect title to the land covered thereby because of a valid adverse claim, or other invalidity existing at the date of its inception, strike out the words "made or" and insert in the blank space *that I have made a homestead entry since March 2, 1889, but have failed or am unable to perfect title to the land covered thereby because of a valid adverse claim or other invalidity existing at the date of its inception.*

B.

Declaration required by President's proclamation of August 19th, 1893, preparatory to occupying or entering upon the lands of the "Cherokee Outlet" for the purpose of filing a soldier's declaratory statement in person.

No. —.

BOOTH IN T. — N., R. —, —, 1893.

I, —, of — county and State or Territory of —, do solemnly declare that I served for a period of — in the Army of the United States during the war of the rebellion, and was honorably discharged therefrom, as shown by a statement of such service herewith, and that I have remained loyal to the Government; that I have not perfected a homestead entry for 160 acres of land under any law except what is known as the commuted provision of the homestead law contained in Sec. 2301, R. S., nor have I filed a declaratory statement under sections 2304 and 2309 of the Revised Statutes, or made or commuted a homestead entry since March 2, 1889, _____

that I have not entered since August 30, 1890, under the land laws of the United States, or filed upon, a quantity of land agricultural in character and not mineral, which, with the tracts now desired, would make more than 320 acres; that I am not the owner in fee simple of 160 acres of land in any State or Territory; that I have not entered upon or occupied, nor will I enter upon or occupy, the lands to be opened to settlement by the President's proclamation of August 19th, 1893, in violation of said proclamation; that I intend to file a soldier's declaratory statement upon said lands, which location will be made for my exclusive use and benefit, for the purpose of my actual settlement and

cultivation, and not, either directly or indirectly, for the use and benefit of any other person.

I certify that the foregoing declaration was made and subscribed before me this _____ day of _____, 1893.

_____,
Officer in charge.

NOTE.—If the party has made an entry or filing since March 2, 1889, to which he is unable to perfect title because of a valid adverse claim, or other invalidity existing at the date of its inception, strike out the words "filed a declaratory statement under sections 2304 and 2309 of the Revised Statutes or made or" and insert in the blank space *that I have made an entry or filing since March 2, 1889, but have failed or am unable to perfect title to the land covered thereby because of a valid adverse claim or other invalidity existing at the date of its inception.*

C.

Declaration required by President's proclamation of August 19th, 1893, preparatory to entering upon the lands of the "Cherokee Outlet" for the purpose of filing a soldier's declaratory statement as agent.

No. _____

BOOTH IN T. _____ N., R. _____,
_____, 1893.

I, _____, of _____, desiring to enter upon the "Cherokee Outlet" for the purpose of filing a soldier's declaratory statement under sections 2304 and 2309, U. S. R. S., as agent of _____, do hereby declare that I have no interest or authority in the matter, present or prospective, beyond the filing of such declaratory statement as the true and lawful attorney of the said _____ as provided by said sections 2304 and 2309.

I certify that the foregoing declaration was made and subscribed before me this _____ day of _____, 1893.

_____,
Officer in charge.

D.

Certificate that must be held by party desiring to occupy or enter upon the lands open to settlement by the President's proclamation of August 19th, 1893, for the purpose of making a homestead entry or filing a soldier's declaratory statement.

No. _____

BOOTH IN T. _____ N., R. _____,
_____, 1893.

This certifies that _____ has this day made the declaration before me required by the President's proclamation of August 19, 1893,

and he is, therefore, permitted to go in upon the lands opened to settlement by said proclamation at the time named therein, for the purpose of making a homestead entry or filing a soldier's declaratory statement.

It is agreed and understood that this certificate will not prevent the district land officers from passing upon the holder's qualifications to enter or file for any of said lands, at the proper time and in the usual manner, and that the holder will be required when he makes his homestead affidavit, or, if a soldier or a soldier's agent, when he files a declaratory statement at the district office, to allege under oath before the officer taking such homestead affidavit, or to whom said declaratory statement is presented for filing, that all of the statements contained in the declaration made by him, upon which this certificate is based are true in every particular.

_____,
Officer in charge.

This certificate is not transferable. The holder will display the certificate, if demanded, after locating on the claim.

E.

Declaration required by President's proclamation of August 19th, 1893, preparatory to occupying or entering upon the lands of the Cherokee Outlet for the purpose of settling upon a town lot.

No. ____.

BOOTH IN T. ____ N., R. ____,
_____, 1893.

I, _____, of _____, being desirous of occupying or entering upon lands opened to settlement by the President's proclamation of August 19, 1893, do solemnly declare that I have not entered upon or occupied nor will I enter upon or occupy, any of the lands to be opened to settlement by the President's proclamation of August 19th, 1893, in violation of the requirements of said proclamation, and that I desire to go in upon said lands for the purpose of settling upon a town lot.

I certify that the foregoing declaration was made and subscribed before me this ____ day of _____, 1893.

_____,
Officer in charge.

F.

Certificate that must be held by party desiring to occupy or enter upon the lands opened to settlement by the President's proclamation of August 19th, 1893, for the purpose of settling upon a town lot.

No. —

BOOTH IN T. — N., R. —,
—, 1893.

This certifies that — has this day made the declaration before me required by the President's proclamation of August 19th, 1893, and he is, therefore, permitted to go in upon the lands opened to settlement by said Proclamation at the time named therein for the purpose of settling upon a town lot.

—,
Officer in charge.

This certificate is not transferable. The holder will display the certificate, if demanded, after locating on claim.

—
(4-102 d.)

AFFIDAVIT.

LAND OFFICE AT —,
—, 189—.

I, —, of —, applying to enter (or file for) a homestead, do solemnly swear that I did not enter upon and occupy any portion of the lands described and declared open to entry in the President's proclamation dated August 19th, 1893, prior to 12 o'clock, noon, of August 19th, 1893, also that all of the statements contained in a certain declaration made by me as foundation for obtaining permission to enter upon the Cherokee Outlet in pursuance of requirements of the President's proclamation opening said Outlet to settlement are true in every particular.

Sworn to and subscribed before me this — day of —, 189—.

NOTE.—This affidavit must be made before the register or receiver of the proper district land office, or before some officer authorized to administer oaths and using a seal.

DESERT LAND CONTEST—EQUITABLE ACTION—FINAL PROOF.

PHILLIPS *v.* ALMY.

A contestant who submits proof showing failure to effect reclamation within the statutory period under a desert land entry, does not thereby acquire the status of an adverse claimant so as to defeat equitable action on said entry, where the government on its own motion has already examined into the cause of said failure, and, with all the facts in its possession, held the entry intact with a view to its equitable adjudication.

Under rule 53 of practice, as amended, final proof submitted during the pendency of a contest, and prior to said amendment, may be considered on the final disposition of the contest.

First Assistant Secretary Sims to the Commissioner of the General Land Office, July 6, 1893.

On June 16, 1877, George A. Black made desert-land entry of the NW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, of Sec. 21, and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 28, T. 1 N., R. 2 W., Salt Lake City land district, Utah Territory.

He failed to reclaim the tract within the period prescribed by law, and on September 25, 1880, you called upon Black to show cause why his entry should not be canceled. To this demand he made no response, and your office, for years, took no further action.

He failed to reclaim the land, and in 1884 sold a relinquishment of his claim to Mary E. Almy. After the actual cancellation she was the first applicant to enter; and her application was allowed, on June 2, 1884.

The next day—June 3, 1884—one Isaac Sears applied to enter the land; but his application was rejected because of the prior entry by Mrs. Almy. From this action of the local officers he appealed to your office, contending that her entry was void. You decided on October 2, 1885, that such was the case, and directed its cancellation.

Mrs. Almy appealed to the Department, which on June 3, 1887, reversed your decision, and directed that her entry remain intact. (See 6 L. D., page 1.)

After making her entry, June 2, 1884, Mrs. Almy took steps looking toward the reclamation of the land, and did some work thereon as late as June, 1885. Sears's contest against her entry was at that time pending before your office, and she hesitated about incurring the heavy expense necessary to reclaim so large a tract (one square mile) until your decision—which was expected by her every day for months—should be rendered. As your decision, when rendered, in October, 1885, held her entry to be void, she suspended all efforts to reclaim the land until the receipt of notice of the departmental decision of June 3, 1887, in her favor. She received such notice on June 15, 1887.

She asserts that her counsel advised her that she was entitled to three years *after notice of the departmental decision* within which to

reclaim the land. It may be noted that it was more than three years after her entry that said decision in her favor was rendered. She proceeded diligently to the work of reclamation, expending in that work, according to the testimony adduced at the hearing, between \$2900 and \$3000.

On July 14, 1890—within three years of receipt of notice of the departmental decision—she offered final proof of reclamation. This final proof was rejected, for reasons hereinafter set forth.

On February 14, 1888, James A. Phillips filed affidavit of contest, on the ground that the land had not been reclaimed within three years from the date of entry (June 2, 1884,) *supra*. The usual fee of one dollar was paid to the clerk in attendance. The register and receiver, in looking into the matter more carefully, were in doubt as to whether, under the peculiar circumstances of the case, a contest would lie; therefore, they decided not to docket the contest, and returned the dollar to Phillips. There is a pencil memorandum on the back of the affidavit, as follows: "Dollar preference right returned: awaiting decision of Secretary of Interior." The meaning of this memorandum is not clear, especially in view of the fact that the only contest in which this entry was involved that had previously been before the Secretary of the Interior was that which had been decided on June 3, 1887—more than eight months prior to the filing of the affidavit. No notice was (at that time) issued on the complaint, and no hearing was ordered.

Eight months later—on October 15, 1888—George K. Bradford, at that date a special agent of your office, made a report, setting forth that the land had not been reclaimed within three years from the date of entry. On November 2, 1888, you held the entry for cancellation on that ground. Mrs. Almy furnished a statement of the facts of the case, and formally applied for a revocation of the order of cancellation; but her application was denied by your office by letter of April 13, 1889. She then applied for a hearing at which she might be allowed to refute the special agent's report. A hearing was granted by your letter of July 10, 1889; but no date was set therefor. Shortly afterward, Special Agent Bradford was removed from his position, and George B. Squire was appointed special agent in his place, to whom the matter was referred for report. He reported on September 2, 1889, setting forth in detail the facts of the case, and recommending the discontinuance of proceedings. Thereupon your office, by letter of September 25, 1889, revoked the order for a hearing, and held that "the entry will remain intact, subject to a full compliance with law."

Pending the proceedings that had been instituted by your office on Special Agent Bradford's report, a new register and receiver were appointed to and took charge of the Salt Lake land office. In overhauling the records they found Phillips's affidavit of contest. Supposing the indorsement upon it to refer to the government proceedings then pending (based on Agent Bradford's report), they held it to await the out-

come of the same. When you, by letter of September 25, 1889, *supra*, revoked the order of cancellation, they notified the attorneys for the contestant that the matter was in such a shape that they could proceed with the contest. Accordingly the case was docketed, and notices were issued January 10, 1890, setting the case for trial on February 18, 1890.

After hearing the testimony, the register and receiver, on May 13, 1890, decided that "the claimant, even though the entry was contested should have proceeded in good faith to reclaim the land;" that "no work done subsequent to the filing of the affidavit shall be considered as against the rights of the contestant;" and that "it is clear to us that the statutory period of three years expired before any portion of the land was reclaimed; and that after that, and before it was properly irrigated (even admitting that it is now), a valid adverse claim intervened, and the contestant established a successful contestant's right to the land."

The defendant appealed to your office, which, on February 6, 1892, reversed the judgment of the register and receiver, and directed that the contest be dismissed. Thereupon Phillips appeals to this Department.

The appellant alleges that you were in error—

In finding that the tract in question had been, at the date of hearing, reclaimed:

If I correctly understand your decision, you did not so find. On the contrary, you say that, should your action in dismissing Phillips's contest become final, the register and receiver "will allow the claimant thirty days in which to make her proof; and should she fail to respond you will notify her to appear at a time set for hearing and show cause why her entry should not be canceled for expiration."

This language would indicate that you entirely ignored the proof offered on July 14, 1890—probably because of its having been offered during the pendency of adverse proceedings (Phillip's contest), in contravention of Rule 53 of Practice, which at the date of your decision had not been amended by the circular of instructions of March 15, 1892. (14 L. D., 250.)

The appellant alleges that you were in error—

In holding that the exercise of good faith on the part of contestee is a compliance with law.

I do not understand that you so held. The language of your decision is that "during the three years, almost, while the contestant's affidavit was apparently sleeping, prior to service of notice, without any excuse being offered therefor, the claimant has, so far as she could, made good her non-compliance during the period complained of." This is a very different thing from holding that the exercise of good faith was a compliance with law.

Appellant further alleges that you were in error—

In finding that the contestee should be made an exception to the law and the rule of practice, by reason of any equities alleged to exist in her favor.

The "law and the rule of practice" which counsel for the contestant alleges were violated by your decision are more specially set forth in the following allegation of error—

The Assistant Commissioner erred in holding that the contestee could cure her laches after the expiration of the three years allowed her by law in which to reclaim had expired, and subsequently to the intervention of the rights of third persons.

Your decision did not so hold. On the contrary, it held, in substance, that no right of any third person had intervened.

The first thing necessary to determine is, whether in fact the right of any third person had intervened.

Special Agent Squires, in his report, referred to above, sets forth the result of a careful and thorough examination of the tract. He gives the date of entry, the fact of the delay in reclaiming the land, and the cause of the delay, and adds that, since the decision in Mrs. Almy's favor "the work has progressed rapidly in the way of ditches and artesian wells . . . by the use of which an abundant supply" (of water) "can be secured, even in the dryest seasons. The main canal of the North Point Consolidated Irrigation Company, being twenty feet in width at the bottom and five feet deep" crosses the land. "I have crossed this canal frequently during the past two months, and have found it always full, and have seen the water flowing copiously through Mrs. Almy's main canal and lateral ditches. . . Total value of improvements on the land, including the water-right, about \$2170."

The charge made by Phillips, in his affidavit of contest, was this:

That the said Mary E. Almy has failed to reclaim said land as required by law during the three years from the date of said entry, nor up to the date hereof; and that said land is now in its natural desert state.

It will be seen that the fact of Mrs. Almy's failure to reclaim the land within three years from date of entry was one of record, to which the attention of the government had already been repeatedly directed; and that the statement that the land was—either at the date of filing the affidavit or of service of notice—"In its natural desert state," had just been investigated by the government, and that upon the report of its special agent the government had revoked its order of cancellation and directed that the entry remain intact.

It has been not only repeatedly but uniformly held by the Department that a second contest will not be allowed on issues tried and determined in the first. (See *Parker v. Gamble*, 3 L. D., 390; *Reeves v. Emblen*, 8 L. D., 444; same on review, 9 L. D., 584; *Samuel J. Bogart*, 9 L. D., 217; *Sewell v. Rockefeller*, 10 L. D., 232; *Mead v. Cushman*, ib., 253; *Hornback v. Dailey*, ib., 318; *Busch v. Devine*, 12 L. D., 317; *McAllister v. Arnold et al.*, ib., 520; *Gray v. Whitehouse*, 15 L. D., 352.)

It is true that each of the cases above cited was a second contest—the charge in the first instance, as well as the second, having been made by a contestant; and it may be contended that, because of this distinction, the rule prohibiting second contests can not properly be

applied in the case here under consideration. But in the case of *Ferguson v. Daly et al.* (14 L. D., 245), the Department affirmed your action in rejecting Ferguson's application to contest, because

the issues involved in the second contest were those which Daly had been called upon to defend in the contest where the government was the prosecutor.

It may be contended, however, that the case of *Ferguson v. Daly et al.*, *supra*, is not entirely similar to the case here under consideration, because in that case a hearing had been had prior to Ferguson's application for another hearing—while in the case at bar you ordered a hearing, but afterwards, on the report of a special agent, rescinded said order.

Nevertheless, if the same reasons are applicable in the case at bar, I can not see why the same rule should not apply.

The reason of the act (May 14, 1880—21 Stat., 140,) granting a preference right, for thirty days, to any person who may contest, pay the land office fees, and procure the cancellation of "any pre-emption, homestead, or timber-culture entry" (desert-land entries, by the way, not being named in the law), is set forth in the case of *Houston v. Coyle* (2 L. D. 58):

The right to contest an . . . entry exists in no one; but in consideration of being placed in possession of certain information, and the payment of certain expenses, the government holds the land in reserve for thirty days . . . This is akin to the law, as it has from time to time existed, granting to the informer a moiety of the penalty imposed upon violaters of the law in criminal cases, and is operative merely as an inducement to parties cognizant of the facts and desirous of securing the land to come forward and furnish the information upon which the proceedings can be based. As in criminal cases, this gives the informer no right to have the proceedings instituted.

In view of the reason underlying the law offering a preference right, under certain circumstances, for valuable information received, can it be held that the contestant herein has brought himself within its provisions? Has an "informer," who has "informed" the government of nothing except what it already knew—furnished no facts excepting those that were previously in its possession, and which it had just considered and acted upon—in any way earned the right to this square mile of land, with the three thousand dollars' worth of improvements that have been placed upon it—improvements made in good faith, in pursuance of the departmental decision of June 3, 1887, holding that the entry was valid, and of your decision of September 25, 1889, declaring that, although at that date five years and three months had elapsed since the entry was made, yet in view of the showing by the special agent it would "remain intact, subject to compliance with law." I am not convinced that, whenever the government has investigated a delay in making final proof, satisfied itself of the good faith of the entryman, and decided to allow the entry to remain intact and submit it to the board of equitable adjudication, "in the absence of any adverse claim," some third party shall be allowed to thrust himself into the

case, present the identical allegations which have just been investigated, and thwart the purpose of the government, upon the plea that *now* there is an adverse claim. The act offering a preference right to parties contestant was intended to assist the government to carry out the ends of justice—not to compel it to perpetrate injustice.

In the case at bar, although the contestant has filed an adverse charge, I do not consider that he has established an adverse claim, such as would interfere with the reference of the entry—should the final proof be found satisfactory—to the board of equitable adjudication. In my opinion, the contest by Phillips upon the exact grounds which had already been investigated by the government to its own full satisfaction, resulting in the dismissal of the charges, was improperly allowed.

I am not unaware of the fact that in the departmental decision in the case of Scott Rhea (8 L. D., 578), it was suggested that, "inasmuch as the government case had failed," it would "be the better practice to take up the affidavit" that had been filed by a contestant while the government's charge against the entry was pending, "and have a regular trial thereon." But that case was in many respects different from the one here under consideration. In that case the government had instituted proceedings, which proved fatally defective for lack of legal notice on the defendant, and were therefore set aside. It clearly appeared that an investigation ought to be made, but it was deemed the better policy to allow the intervening contestant to make it, and bear the expense of the same. That was a very different case from one in which the government has made its investigation, is in full possession of the facts, and has arrived at and announced its conclusion that further investigation is unnecessary.

For the reasons herein given the contest is dismissed, and to this extent your decision is affirmed. You add, however, the following directions to the local officers:

Should this decision become final, you will allow the claimant thirty days in which to make her proof; and should she fail to respond, you will notify her to appear at a time set for hearing, and show cause why her entry should not be canceled for expiration.

This action, as before suggested, was probably taken in view of the fact that at the time the entryman offered final proof, on July 14, 1890, Rule 53 of Practice was in full effect, unmodified by the instructions of the circular of March 15, 1892 (14 L. D., 250); and under that rule the proof was improperly taken and could not be considered. (*Laffoon v. Artis*, 9 L. D., 279, and many other cases.)

Said circular of March 15, 1892, says that where a contest has been brought against any entry or filing, "the entryman may . . . submit final proof," etc. Construed literally, this might appear to authorize the taking of final proof during contest only after the date of said circular. The Department has held, however, in the case of *Smith v. Chapin* (14 L. D., 411), and in other cases since, that under the above

instructions proof that had been offered prior to the date thereof might be considered. Under this ruling it appears that you might properly consider the proof offered by Mrs. Almy on July 14, 1890. If such proof should show the reclamation of the land, the entry will, as hereinbefore suggested, be submitted to the board of equitable adjudication for its consideration and action.

Your decision is modified as above indicated.

RESERVATION—STATUTORY WITHDRAWAL.

YELLOWSTONE NATIONAL PARK.

Lands embraced within the Crow Indian reservation under the treaty of May 6, 1868, and subsequently included within the boundaries of the Yellowstone National Park, as fixed by act of Congress March 1, 1872, were appropriated for the purposes of said park as of the date of said act, subject only to the existing right of the Indians, and when said right was extinguished the lands covered thereby became a part of the park, without qualification of any character.

Assistant Attorney-General Hall to the Secretary of the Interior, May 25, 1893.

I have the honor to acknowledge the receipt, by reference of Acting Secretary Sims, of the letter of Geo. S. Anderson, Acting Superintendent of the Yellowstone National Park, citing the fact that a portion of the land included within the boundaries of the park, as fixed by the act of March 1, 1872, (17 Stat., 72), now section 2474, R. S., was included in the Crow Indian reservation under the treaty of May 6, 1868, (15 Stat., 649) and ceded by the Indians by agreement ratified by act of Congress, approved April 11, 1882, (22 Stat., 42) and asking "a decision as to the present status of this strip, and to know what action, if any, shall be had against persons claiming rights thereon", with a request for an opinion upon the points set forth in said letter.

By the act of March 1, 1872, *supra*, it is declared that a certain tract of land described by metes and bounds

is reserved and withdrawn from settlement, occupancy, or sale, under the laws of the United States, and dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people; and all persons who locate, or settle upon, or occupy any part of the land thus set apart as a public park, except as provided in the following section, shall be considered trespassers and removed therefrom.

The next section gave the Secretary of the Interior exclusive control of the park, and authorized him to make such regulations as might be necessary to preserve the natural curiosities and for the comfort of visitors, and it was to those who might be in the park under the regulations that the exception in the preceding section referred.

The northern boundary line of the park, as fixed by this act, fell inside the Crow Indian reservation for a portion of its length, and it is

as to the lands inside both reservations that the question now arises. It must be kept in mind that the fee to this land was in the United States, subject only to right of the Indians to occupy it as a tribe, or the right of individual members of the tribe to select it in tracts not exceeding three hundred and twenty acres, under the provision of their treaty. The Indians, however, subsequently relinquished all their claims of every character.

The act of Congress approving the agreement with the Indians did not in terms provide for the disposal of the lands ceded thereby under the general land laws, but the Secretary of the Interior, by letter of May 25, 1883, (41 L. and R., 30) to the Commissioner of the General Land Office, expressed the opinion that such lands became public lands at the date of the act approving the agreement, and directed that legal applications therefor should be received.

The act of Congress setting these lands aside must, in my opinion, be held to have taken effect on these lands at the date of its approval, subject only to the existing right of the Indians, and that as soon as that right was extinguished said lands became a part of the park, without qualification of any character.

In the case of Charles W. Filkins, (5 L. D., 49), it was held that lands embraced in an executive order of reservation, made for a public purpose, but covered at the date of such order by a homestead entry, became subject to the order of reservation upon the cancellation of such entry, and this ruling was followed in *Staltz v. White Spirit, et al.* (10 L. D., 144), and in *James M. Gilman* (15 L. D., 2). The rule would apply with equal force in a case like the present, where the reservation was made directly by Congress, in which body is vested the power of disposing of the public domain.

In the case of *Beecher v. Wetherby* (95 U. S., 517), it was held that the United States could dispose of the fee of lands occupied by the Indians, subject to the existing occupancy of such Indians. If lands thus occupied might be sold and conveyed by the United States, there can certainly be no question as to the power to set them aside for a public use, as in this case.

I am of the opinion, and so advise you, that the reservation of these lands was effective from the date of the act of March 1, 1872, and that thereafter they were not subject to settlement, occupancy or sale.

As to what action, if any, shall be had against persons claiming rights to these lands, I am unable to give any opinion, because I am not informed as to the nature of such claims, or the date of initiation thereof.

Approved, September 7, 1893.

WM. H. SIMS,
Acting Secretary.

OKLAHOMA LANDS—PAYMENT.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., September 13, 1893.

REGISTER AND RECEIVER,

Oklahoma, Oklahoma Territory.

GENTLEMEN: I have to advise you that there is now pending in Congress, a bill for extending the time within which the first payment of purchase money in case of entries of lands ceded by the Citizen Band of Pottawatomie and the Absentee Shawnee Indians, and of lands ceded by the Cheyenne and Arapahoe Indians, is required to be made under the 16th section of the act of March 3, 1891, 26 Stat., 1026.

The class of lands first mentioned were opened to entry September 22, 1891, and the two year period for making such payment will expire in some cases before Congress will have time to act upon the bill referred to. I have, therefore, to direct, in reference to the Pottawatomie and Absentee Shawnee lands, above mentioned, that you postpone making demand for the first instalment of purchase money, under instructions of circular of June 8, 1893, 17 L. D., 51, until further instructions from this office, in order to afford time for Congress to act upon the proposed legislation.

The Cheyenne and Arapahoe lands were not opened to entry until April 19, 1892, and the period within which payment of the first instalment is required to be made will not expire in any entry thereof before April 20, 1894.

Respectfully,

S. W. LAMOREUX,

Commissioner.

Approved.

HOKE SMITH,

Secretary.

RAILROAD GRANT—PRE-EMPTION FILING.

SPAULDING v. ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

Land embraced within a pre-emption filing, at the date when the right of the company would otherwise attach, is excepted from the operation of the grant. The matter of settlement or improvement is not, under such circumstances, a question into which the company will be permitted to inquire.

First Assistant Secretary Sims to the Commissioner of the General Land Office, September 15, 1893.

The land involved in this controversy is the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and lots 5 and 6, Sec. 27, T. 134, R. 43, Fergus Falls, Minnesota, land dis-

trict, and was within the granted limits of the St. Paul, Minneapolis and Manitoba Railroad Company.

It appears from the record that Elias C. Spaulding made application to make homestead entry of said tract May 6, 1884. The same was rejected by the local officers. Spaulding appealed, and you, by letter of July 23, 1884, ordered a hearing to determine the status of the land on December 19, 1871, and January 10, 1872, it being stated by you that—

Said tracts are within the ten miles, or granted limits, of the grant for the above mentioned company, the right of which attached in said limits upon definite location, December 19, 1871.

Said tracts are also within the thirty miles, or indemnity limits, of the grant to the Northern Pacific R. R. Co., the order of withdrawal for which was received at Alexandria, now Fergus Falls, January 10, 1872.

The records of this office show that Theodore Karels filed D. S. 670 for SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ and lot 9, Sec. 22, and E. $\frac{1}{2}$ NE. $\frac{1}{4}$ and lot 5, Sec. 27—134—43, June 3, 1871, alleging settlement same date.

Henry Burgeduff filed D. S. for same tracts as covered by Karels filing, on March 6 1871, alleging settlement January 1, 1870.

Anton Michke filed D. S. 873 for E. $\frac{1}{2}$ SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ NE. $\frac{1}{4}$ Sec. 27,—134—43, Sept. 13, 1871, alleging settlement August 23, 1871.

All the above filings have been canceled upon the records under office circular of April 2, 1881.

The St. P., M. & M. Ry. Co. selected the E. $\frac{1}{2}$ NE. $\frac{1}{4}$ and lots 5 and 6, Sec. 27—134—43, the tracts covered by the present application, on February 7, 1882.

Both of the railroad companies and the applicant having been notified, the hearing was had before the local officers, the Northern Pacific Railroad Company making default. The testimony was directed entirely to the acts of settlement and occupancy of Burgeduff. The register and receiver decided that there was neither settlement or occupancy as contemplated by the pre-emption law on the tract, and therefore it should pass to the railroad company under its grant. Spaulding appealed and you, by letter of April 27, 1889, reversed their decision. Thereupon the St. Paul, Minneapolis and Manitoba Railroad Company prosecute this appeal, assigning an error, substantially that your decision is against the law and evidence.

It is undisputed that pre-emption filings covered the land in controversy at the time when the right of the company would otherwise have attached, and served to except the land from the operation of the grant. The matter of settlement or improvement is not, under such circumstances, a question into which the railroad will be permitted to inquire (*Kansas Pacific Railway Company v. Dunmeyer*, 113 U. S., 535). The land not being free from pre-emption claims, it follows that it did not pass by the grant, and is therefore subject to the entry of the first legal applicant (*Northern Pacific R. R. Co. v. Johnson*, 7 L. D., 357). Objection is made by counsel to allowing the entry on lot 6, claiming that it had not been included in Burgeduff's filing. It is true, it was not included in his filing, but it was in Michke's, being described therein as

the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, which an examination of the plat in your office shows is lots 5 and 6.

Your judgment is therefore affirmed.

By your letter of transmittal you state that this tract was inadvertently and erroneously conveyed to the State of Minnesota, and by the State to the railway company. This being so, you will give the company notice to show cause why proceedings should not be taken in accordance with the provisions of the act of March 3, 1887 (24 Stat., 556), to secure the restoration of said lands to the government.

RAILROAD GRANT—HOMESTEAD ENTRY—REINSTATEMENT.

DARCY v. NORTHERN PACIFIC R. R. Co.

The provisions of section 3, act of March 3, 1887, warrant the reinstatement of an entry erroneously canceled on account of a railroad grant, though the judgment of cancellation was rendered in accordance with the rulings of the Department then in force.

Land embraced within a homestead entry at the date of a railroad grant is excepted thereby from the operation of the grant, and on the cancellation of such entry remains a part of the public domain.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

The land involved herein is the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 5, T. 16 N., R. 2 W., Olympia, Washington, land district, and is within the primary limits of the Northern Pacific Railroad grant, pertaining to the line between Portland and Tacoma, which grant was made by joint resolution of May 31, 1870 (16 Stat., 378).

By departmental decision of March 20, 1891 (Letter Press Copy Book No. 216, p. 112), it was decided that "the tract was free from claim at the date of definite location of said road, and it therefore inured to the company under its grant."

On September 2, 1892, Patrick Darcy filed a petition in the local office requesting a re-instatement of his homestead entry, canceled by said decision, alleging—

That William Spencer made H'd. entry 502, Feb. 24, 1865, for the same tract and this entry was canceled June 17, 1872; that James Turner, Nov. 14, 1865, made H. E. No. 566 for said tract and same was canceled Nov. 7, 1868; and that Paris R. Winslow, Dec. 7, '68, made H. E. 777 for said tract and same was canceled February 11, 1871,

and asking that his entry may be re-instated under section 3 of the act of March 3, 1887 (24 Stat., 556).

An informal examination of the records of your office discloses the fact that the above statement is true.

The said act of March 3, 1887, *supra*, is "an act to provide for the adjustment of land grants made by Congress to aid in the construction

of railroads and for the forfeiture of unearned lands, and for other purposes." Section 3 provides—

That if, in the adjustment of said grants, it shall appear that the homestead, or pre-emption entry of any *bona fide* settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be re-instated in all his rights and allowed to perfect his entry by complying with the public land laws, etc.

It is under the terms of this act that petitioner asks to have his entry re-instated, notwithstanding the former decision cancelling his entry.

At the time of the rendition of departmental decision of March 20, 1891, (*supra*) the rule was that if the tract was free from claim at the date of definite location of the road, it passed to the company under the terms of its grant. Subsequently, however, the United States supreme court, in the case of *Barden v. Northern Pacific Railroad Company* (145 U. S., 535) held that—

Land which, at the time of the grant was segregated from the public lands within the limits of the grant by reason of a prior pre-emption claim to it, did not, by the cancellation of the pre-emption right before the location of the grant pass to the company, but remained part of the public lands of the United States, subject to be acquired by a subsequent pre-emption settlement followed up by acquisition of title (syllabus).

Following the doctrine announced by the supreme court it is apparent that Darcy's entry should be re-instated, as the tract was segregated from the public domain prior to the grant to the railroad company of May 31, 1870, *supra*. (*Northern Pacific Railroad Company v. Mead*, 16 L. D., 488; *Northern Pacific Railroad Company v. Smalley*, 15 L. D., 36.)

You will accordingly notify him that upon making the showing required by the circular of February 13, 1888 (8 L. D., 348), containing instructions under said act, his homestead entry will be re-instated, and that he will be permitted to retain the same.

SCHOOL LANDS—INDEMNITY SELECTION.

MICHAEL DERMODY.

The State may not, at will, waive its right to school land in place and take lieu
lands of equal acreage.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

Michael Dermody has appealed from your decision of April 17, 1891, holding for cancellation his homestead entry, made December 26, 1890, for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 16, T. 35 N., R. 9 W., N. M. M., Durango, Colorado.

As grounds of error, it is alleged that the decision "is founded on a radical misapprehension of the true facts," etc.

In considering the motion for review, your office, by decision dated November 3, 1891, states that "the tract is returned as non-mineral on the plat of November 13, 1883," and in his application to make homestead entry, Dermody filed the usual non-mineral affidavit, saying "there is not to his knowledge . . . any deposit of coal," etc.

If the land is non-mineral in quality, sworn to be such by the entry man, and so reported by your office, it passed to the State as school lands, under the act of March 3, 1875, admitting Colorado into the Union.

The act of February 28, 1891 (26 Stat., 798), amending sections 2275 and 2276 of the Revised Statutes, provides as follows:

And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory, where sections 16 and 36 are mineral, etc.

Provided: Where any state is entitled to said sections 16 and 36, or where said sections are reserved to any territory, notwithstanding the same may be mineral land . . . the selections of such lands in lieu thereof, by said state or territory, shall be a waiver of its right to said section.

The State, in this instance, through its board of land commissioners, on January 10, 1891, and again on June 24, of the same year, expressed its willingness to accept indemnity for the land, upon the supposition that the survey showed the same to be mineral. The State also appears to have relinquished its claim to the land, with a view to taking indemnity therefor, and also on the grounds that "Dermody has acquired an equity as a settler prior to survey."

If, under the statute above quoted, the State had applied for indemnity on the grounds of the showing made by the survey of 1877, that the land was mineral, and the selection of lieu lands had been approved, an entirely different question would be presented. While the State has expressed its desire to select lieu land, yet it has not done so, and the Department can not permit an existing entry to remain on land that has already passed to the State, or assent to the doctrine that the State at will may waive its right to land in place and select in lieu thereof other lands.

It is unnecessary to discuss the questions of fact raised by the appeal as to the character of the land as shown by the survey of 1883. You state that the land is returned as non-mineral by that survey, and claimant himself filed the usual non-mineral affidavit in his application. But, even if the survey of 1883 did make a primary showing of the existence of coal on the land, still, in the absence of a selection by the State of lieu lands, and the approval thereof by the proper authorities, it would be improper for this Department, in advance of a selection, to permit the entry to remain intact, on a simple agreement of the State to select other lands, and, in anticipation of the ability of claimant to show by proofs that the land is really non-mineral in character, so as to ultimately obtain title thereto. Such disposition would be, in effect,

to admit the right of the State to waive its right to land already granted and take lieu lands, which can not be done.

It must be shown that the land is agricultural in character before Dermody could receive patent therefor. The proof of its agricultural quality must have been determined upon, and, with that idea in view, appellant insists that the government must accept the alleged showing of its mineral quality to enable the State to select lieu lands, at the same time anticipating his ability to show the non-mineral quality with view to his complete title thereto.

This position is inconsistent with the doctrine herein announced, that the State may not, at will, waive its right to land already granted, and take lieu lands of equal acreage.

The Department is, for reasons above given, powerless to relieve Mr. Dermody; and the decision appealed from must be, and it is therefore, affirmed.

NICHOLS v. GEDDES.

Motion for review of departmental decision of January 11, 1893, 16 L. D., 42, denied by Secretary Smith, September 21, 1893.

COAL LAND ENTRY—FILING—AMENDED CLAIM.

CHARLES H. ACKERT.

A coal land entry embracing land not included in the declaratory statement, but necessary to the working of the mine and not in excess of the legal acreage, may be allowed to stand where good faith on the part of the entryman is manifest.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

I have considered the appeal of Charles H. Ackert from your decision of October 14, 1892, adhering, on review, to your decision of October 30, 1890, in which you held for cancellation his coal land entry for the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 34, T. 10 S., R. 98 W., Montrose land district, Colorado, said appeal being also from the original decision.

The record shows that on February 13, 1890, one, Charles E. Phelps filed his coal declaratory statement for the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said Sec. 34. On May 7, 1890, said Charles H. Ackert (claimant) filed his coal declaratory statement for the SE. $\frac{1}{4}$ of said NW. $\frac{1}{4}$ of Sec. 34. Each had filed under section 2348, R. S., as having "opened and improved" his respective tract.

May 24, 1890, Phelps assigned to Ackert his preference right of purchase, of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$.

June 12, 1890, Ackert made entry for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section, and upon showing that the land was more than fifteen miles

from any completed railroad, the price was fixed at \$10 per acre, which he paid, and received his final receipt.

On October 30, 1890, your predecessor held that this was equivalent to two filings; and the entry was held for cancellation as to the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, upon authority of the 9th paragraph of the regulations, citing also 10 L. D., 539, and 11 L. D., 351.

Thereupon motion was filed for a rehearing and reversal of said ruling, and upon your adhering to such ruling and decision, an appeal was taken as herein stated.

The evidence shows that each of said parties had opened coal mines on the tracts; that Ackert could not operate the mine on his tract economically; that the coal could be taken out through the Phelps tunnel to advantage; that he paid Phelps \$100 for his preference right and improvements. The tunnel in it is about 375 feet long, driven into the coal some 50 feet, at a cost of about \$1400. The cost of most of this tunnel has been borne by Ackert, and to separate the tracts would almost entirely destroy the value of the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, on account of the topography of the tracts, and the conditions of the coal, the character of the formation, etc.

The act of Congress, passed March 3, 1873, R. S., section 2347, gave to every person above twenty-one years of age, who was a citizen of the United States, or who had declared his intention to become such, a right to *enter one* tract of coal land not exceeding 160 acres, fixing the price, etc.

Section 2348 provided that where a person has opened and improved a coal mine on the tract, he should be entitled to a preference right of entry, and the following section, 2349, prescribed the manner of securing such preference right, limiting the time of filing his papers to sixty days after the date of actual possession, and the commencement of the improvements on the land; there was an exception to this where the township plat was not filed in the district office.

This right was secured by filing a declaratory statement, corroborated as other declaratory statements.

Section 2350 says: "The three preceding sections shall be held to authorize only one entry by the same person or association of persons," etc. A person who was a member of an association that had taken coal land could not take a tract as an individual. This section further provided that persons who had filed under section 2348, must prove their rights, and pay for the land filed upon, within one year from the time prescribed for filing their claims.

Section 2351 relates to conflicting claims, and the last paragraph is as follows: "The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this, and the four preceding sections."

Under this paragraph the Commissioner, on July 31, 1882, (1 L. D., 687), issued a circular of "rules and regulations" under the "coal-land law." The 9th paragraph of this circular says: "One person can have

the benefit of one entry or filing *only*." On this you base your ruling in the case.

In each of the cases cited in the decision appealed from there had been an abandonment of one coal filing and the making of or attempt to make a second filing on different land. In the case at bar there was no abandonment by Ackert of his filing. He, in fact, made but one filing, and this for only forty acres, while, under the law, he had the right to file for one hundred and sixty acres. After his purchase from Phelps of the adjoining forty, the right to which, under the regulations, he had a right to purchase, he included that in his application to enter, and his entry was allowed. He bought and added said adjoining forty acres to his original claim, because without it his original claim was practically worthless, on account of the dip of the vein or bed of coal, etc.

I am satisfied that he acted in good faith; he has prosecuted the work of development, has expended considerable money in driving a long tunnel into coal, and in preparing for mining, and has paid the government the price for the land, which altogether is only one-half the acreage allowed to one entryman under the coal land law.

I am of the opinion, under all the circumstances of the case, that by his taking one entry of eighty acres in one body, while the original filing was for only forty acres, may properly be regarded and treated as a change of claim in the nature of an amendment, and that, in view of appellant's manifest good faith, his entry as made should be allowed to stand. It is so ordered.

The decision of your office is modified accordingly.*

UNITED STATES *v.* CROW.

Motion for review of departmental decision of March 27, 1893, 16 L. D., 331, denied by Secretary Smith, September 21, 1893.

RAILROAD GRANT—INDEMNITY WITHDRAWAL—HOMESTEAD ENTRY.

SOUTHERN PACIFIC R. R. CO. *v.* WATERS.

A homestead entry of land included within an existing indemnity withdrawal, but for which the right of selection had not been asserted at the date of final proof, or prior to the revocation of the withdrawal, is not defeated by a mere protest of the company against the final proof filed while the withdrawal is in force. A railroad company is not entitled to special notice of intention to submit final proof under a homestead entry of an unselected tract, included within an existing indemnity withdrawal.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

I have considered the appeal of the Southern Pacific Railroad Company from the decision of your office of October 5, 1888, allowing the

commuted cash entry of Carroll H. Waters for lots 1, 2, 3, 4, and 5, and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 13 T., 25 S., R. 15 E., M. D. M. San Francisco, California.

The material facts in the case are as follows:

The land is within the indemnity limits of the Southern Pacific Railroad Company, a withdrawal of which was made for the benefit of said company in 1867. While the withdrawal was in force—to wit June 10, 1886—Waters made homestead entry of the tracts in controversy, and on June 22, 1887, gave notice by publication of his intention to make final proof in support of his claim before the county clerk of San Luis Obispo county, California at the county seat, August 13, 1887, giving special notice thereof to the railroad company.

On July 23, the Southern Pacific Railroad Company filed the following protest:

The Southern Pacific Railroad Company hereby protest against the consideration of the final proof to be offered by Carroll H. Waters before the county clerk of San Luis Obispo county, at the county seat, on Saturday August 13, 1887 in support of his homestead application No. 7763, for lots 1, 2, 3, 4, and 5, and SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 13, T. 25 S., R. 15 E., M. D. M.

This land is within the indemnity limits of the withdrawal made for the benefit of the Southern Pacific Railroad Company on May 21, 1867 which withdrawal is still in force. Carroll H. Waters could not, therefore, acquire any right to the land by virtue of settlement subsequent to the date of the withdrawal.

The summons in this case served on me, as Land Agent of the S. P. R. R. Co., and which I have attached hereto, does not mention the date of Water's settlement, and gives no ground of contest, as required by subdivision 6 of Rule 3, Rules of Practice; nor does it state when the entry was made as required by subdivision 5 of said Rule. This proceeding being irregular, in that it has not been instituted in accordance with the rules of practice, should be dismissed.

On August 13, 1887, Waters in accordance with published notice, made final proof at the time and place and before the officer designated in the notice. At the date of said final proof no selection had been made by the company of these tracts, nor had it filed any application to select them or designated any deficiency in its granted limits which would authorize it to make selection of said lands. The local officers declined to accept said proof for the reason that the land had been withdrawn for the benefit of said company, and was not subject to entry. On August 15, 1887, two days after the taking of said proof, the order of withdrawal of said lands was revoked by the Department, and they were restored to settlement and entry under the general land laws, except such as were covered by approved selections, or to which the right of selection had attached prior to such revocation. No appeal was taken from the action of the local officers rejecting said proof, but your office by letter of October 15, 1887, directed the local officers to instruct the claimant that if he would re-file in the local office the final proof which had been returned to him, with new final affidavit showing continuous residence up to date, he would be permitted to make entry of the tracts if the proof is found satisfactory. In accordance

with these instructions, the affidavit was filed, the entry allowed, and on November 16, 1887, final certificate and receipt issued therefor, which was forwarded to your office, with the protest of the company.

By decision of October 5, 1888, you dismissed the protest of the railroad company, upon the ground that the indemnity withdrawal having been revoked, and no selection of the land having been made by the company, it had no interest in the matter, and Waters was advised that action would be taken in due time, looking to the confirmation of his entry. From this decision the company appealed, alleging the following grounds of error:

1. That the land having been withdrawn at the dates when entry and proof were made, the same were illegal and void.
2. As the summons did not conform to the Rules of Practice, the company did not have due notice.
3. If, however, the notice is held sufficient, the fact that the company filed its protest against allowance of proof, shows it was not in default.
4. The Acting Commissioner is in error in asserting the company has no interest in the land, because your records show that on July 25, last the company officially advised you that it had completed its road past this land, and for such deficiency as may appear within the granted limits the company will be entitled to indemnity.

The entry of Waters could have been defeated or avoided at the instance of the company at any time during the existence of the withdrawal by asserting its claim and showing a right of selection of the tracts.

In the case of *Brady v. Southern Pacific Railroad Company* (5 L. D., 658), the Department held that the right of a railroad company to make selections in indemnity limits is nothing more or less than a preference right of selection which they may assert against every one, but that an entry made of lands in said limits is not unlawful, and the failure of the company to assert its claim as against said entry is equivalent to a declaration that it does not intend to select that particular tract.

But it is contended by the company that having filed its protest against the allowance of said proof, while the withdrawal was in force, and when it could have defeated or avoided the entry of Waters by asserting its right of selection, that the subsequent revocation of the withdrawal did not operate to defeat its right to make selection of the land afterwards for such deficiency as may appear within the granted limits of the company, and for which the company would be entitled to indemnity. It cannot be questioned that if the withdrawal had continued in force, the mere protest against the allowance of the entry would have been sufficient to defeat the entry, whether a selection had or had not been made, or whether the company had or had not filed an application to make selection of the tract, because the object of the reservation was to withhold from entry all lands not excepted from said withdrawal, for the purpose of allowing the company to make selection of said lands, whenever the deficiencies in its granted limits might afterwards be shown. But after the revocation of the withdrawal,

all lands not selected by the company, or for which proper applications to select had not been filed, were restored to settlement and entry, and a mere protest against the allowance of an entry made while the land was withdrawn, without selection or without having filed a proper application to select it, would give the company no more right to select such tract after revocation, by reason of having filed the protest, while the land was in reservation, than it would have to select any other tract within said limits upon which entry had been made after the revocation of the withdrawal.

The alleged irregularity of the summons served upon the company is immaterial, as it would have been charged with notice by publication, if no special notice had been served. *Southern Pacific R. R. Co. v. Goodenough*, January 11, 1889; *Catlin v. Northern Pacific R. R. Co.* (9 L. D., 423.)

Your decision dismissing the protest of the company is affirmed.

TIMBER CULTURE ENTRY—APPLICATION—REPEAL.

EDWARD MARLOW.

The repeal of the timber culture law prior to the receipt at the local office of an application to enter thereunder, defeats the right of entry. The delay of the application in the mails, by reason of a "storm and washout," does not relieve the applicant from the effect of the repeal.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

I have considered the motion for review filed by Edward Marlow of departmental decision of October 17, 1892, (unreported). By said decision it is shown that Marlow's application to make timber-culture entry of lots 3 and 4 and the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 31, T. 2 N., R. 1 E., Tucson, Arizona, land district, was received at the local office March 4, 1891, and rejected because the timber-culture law had been repealed by the act of March 3, 1891, (26 Stat., 1095). The action of the local office was affirmed by you and on appeal your judgment was affirmed by said decision.

The applicant now asks for a review of my decision, alleging as a ground therefor that his application to enter said land "was made and initiated about eight days before the repeal of the law, and the application should have been received in Tucson one day after leaving Phoenix, but was delayed by a sudden storm and washout," and insists that as this delay was caused by "the acts of the elements," wholly beyond his control, that his entry should be allowed.

A claim is not "lawfully initiated" until the application has been filed in the local office accompanied by the requisite fees. (*August W. Hendrickson*, 13 L. D., 169). Now the timber-culture law had been

repealed before this application was received at the local office and it matters not what may have been the cause of the delay the inevitable fact is that there was no law at that time, authorizing the entry. (Alice Carter, 15 L. D., 539). The motion is therefore dismissed, and the papers herewith returned.

RAILROAD GRANT—MINERAL LAND—SURVEYOR GENERAL'S RETURN.

WINSCOTT *v.* NORTHERN PACIFIC R. R. Co.

The presumption as to the mineral or agricultural character of a tract, created by the return of the surveyor general, does not preclude the assertion of any right, or the proof of the facts in the case as they really exist.

All mineral lands are excepted from the grant to this company, and, until the issuance of patent, the Department is vested with the jurisdiction to determine whether any portion of the land included within the limits of the grant is mineral in character, and the exercise of such authority is an imperative duty of the Department.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

The case of the Northern Pacific Railroad Company *v.* John Winscott, involving a portion of the SW. $\frac{1}{4}$ of Sec. 31, T. 10 N., R. 3 W., Helena, Montana, is brought before me on the appeal of the company from your decision of March 12, 1892.

It appears that said section was surveyed in 1868 and returned as mineral land. It is within the primary limits of the grant made to the Northern Pacific Railroad Company by the act of March 2, 1864 (13 Stat., 365), as shown by its map of definite location, which was filed July 6, 1882, and it was listed by the company, as of its granted lands, in 1886, but said list has not been approved, and, consequently, no patent has been issued therefor.

On January 1, 1883, John Winscott and D. B. Henry located the Ruby Lode claim, 18.94 acres in extent, in the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section, and, on October 30, 1890, Winscott made application for patent for the same under the mineral laws. This was refused because the land had been listed by the company. On proper showing by the applicant, a hearing was ordered by your office to determine the character of the land. The hearing was duly had; both parties submitted testimony, and, on consideration of the same, the register and receiver recommended that the railroad list be canceled to the extent of its conflict with the Ruby Lode claim and that the latter be allowed. On appeal, this action of the register and receiver was affirmed by your office.

It is insisted, in substance, on behalf of the railroad company, that undue weight has been given to the presumption arising from the surveyor's return of the mineral character of the section in which said

tract is located; that said return is, in effect, fully rebutted by the fact that thereafter for fourteen years, up to the time of the definite location of the railroad, and for upwards of twenty years, up to the time of hearing, though often prospected, minerals had not been found therein in paying quantities; therefore, there was error in holding that the burden of proof was upon the company to show the non-mineral character of the land, and that without thus placing the burden of proof upon the company, the evidence fails to show that the land is sufficiently valuable for the minerals it contains to bring it within the exception to the railroad grant.

Without entirely concurring in these views as to the force of the presumption arising from the surveyor's return, there is much force in them.

The act of May 18, 1796 (1 Stat., 464), now embodied in section 2395 of the Revised Statutes, prescribed many of the rules which are yet followed in surveying the public lands. It directed that the lands be laid off into townships six miles square, by running lines north and south, to be crossed by others running at right angles to them. The corners of each township were to be marked and also each distance of a mile between the corners. The townships were to be divided into sections of six hundred and forty acres each, by running through the townships, each way, parallel lines "at the end of every two miles; and by making a corner on each of said lines at the end of every mile." Thus, the outlines only of every other section were run, the corner of the intermediate section only being then fixed, and the outline thereof being protracted on the plat when made.

Subsequently, Congress directed that the lands be sold by half and quarter sections, and the surveyor-general was directed to thus divide the sections by north and south, and east and west lines protracted upon the plats, it not being intended that he should "run the subdivisional lines." 2d Public Land Laws, 820; *ibid.*, 854.

Subsequently, the Commissioner of the General Land Office issued a "Manual of Surveying Instructions," for the guidance of surveyors and their deputies. By this manual, it was directed that the outlines of each section be actually surveyed, and the quarter section corners established on the line as run. This manual has been legalized by act of Congress, and is "deemed to be part of every contract for surveying the public lands" (R. S. Sec. 2399). As the public lands are only surveyed by contract, they must necessarily be surveyed according to the manual, and thus, indirectly, the law requires that the outlines of each section should be actually surveyed.

It results therefore that only the section lines, or, rather, the outlines of the sections, are run, the minor subdivisions not being surveyed in the field. The surveyor-general, in making his plats, merely protracts these imaginary subdivisional lines, in red ink, upon the plats, connecting the opposite corners both ways, thus making the quarter sections; these, in turn, are again subdivided, in like manner, into quarter quar-

ters, or forty acre tracts. (Public Domain, 184.) So that there is no law, nor instructions, requiring the surveyor, in his line of duty, to go anywhere than along the borders or outlines of the section he is surveying.

By the same act of 1796, R. S. 2395, Sec. 7, it is provided that:

Every surveyor shall note in his field book the true situation of all mines, salt licks, salt springs and mill seats, which come to his knowledge, all water courses over which the line he runs may pass, and also the quality of the lands.

It is under this last provision that the report of the surveyor is made, which creates the presumption referred to.

The surveyor, as a public officer, must follow the law, and that does not require him or afford him an opportunity to pass over the interior or body of the section he is surveying. He is directed to report the situation of "all mines" that "come to his knowledge," and all water courses over which "the line he runs may pass." He is not directed to search for mines or water courses, but to report such as come to his knowledge whilst passing along the outlines of the section he is surveying. This is all he is required to do in the discharge of his duty. The law nowhere says that the report thus made is to be conclusive of even matters of fact reported, and certainly it would be contrary to all rules of sound reason to hold that such a report is to be conclusive or even presumptive negatively—that is, of matters not reported. The most that can be said in favor of such report is, that it raises a presumption as to the belief or opinion of the surveyor as to the matters of fact affirmatively stated by him. These instructions to the surveyor relate only to his report of "mines." He may or may not report that the lands indicate that valuable minerals are hid beneath their surface. Such indications are not "mines." A report to that effect, not being required by the law, is optional with him. Being something beyond his required duty, no conclusion of law arises from it; it is merely a statement of the officer, more or less valuable according to his opportunities of observation, and ought not preclude the assertion of any right or the proof of the facts of the case as they really exist.

It has been seen how limited are these opportunities of observation; the officer merely passing over the confines of the section, with his attention more directly absorbed by the duties of his scientific profession, and the necessity for absolute accuracy in his courses and distances. Even were he a geologist or mineralist, his opportunities of observation along the course of his lines would be the scantiest; and beyond those lines, or on either side of them, his duties do not carry, but prohibit, him from going. So that, practically, the interior of the section or that portion thereof not immediately along the line being run, is beyond the observation or knowledge of the surveyor, and his opinion in relation to the same can not be of much value.

So that the report of the surveyor must necessarily constitute but a small element of consideration, when the question is as to the true character of the land.

And this has been the ruling of the Department and the courts for a long time. See *Cole v. Markley* (2 L. D., 847), where the subject is ably and exhaustively discussed and numerous authorities cited to sustain the views herein stated:

In the case cited, it was a question as to the effect of report of the surveyor that certain lands were salines. After reviewing all the decisions, and discussing the subject at great length, Secretary Teller said, on page 851:

These cases seem to be decisive of the issue raised in the case at bar, and to establish the rule that a notation of "saline" on the plats, or its omission, is immaterial, and that no land but that in fact saline, is reserved from agricultural entry. . . . The character of the lands is a question to be determined by due proofs, and the qualified party who first settles upon them, or applies to enter them, and otherwise conforms to the law, has priority of right when their non-saline character is determined.

To the same effect is the case of *Robinson v. Forrest*, 29 Cal. Rep., 321; *Merrill v. Dixon*, 15 Nev., 401, 405, et seq.; *Morton v. Nebraska*, 21 Wall., 660, 674.

The surveyor's report in this case therefore has but little weight with me in its determination. But apart from that report, the evidence clearly discloses the existence of a promising mineral lode. The claim of the company that it was not known to be mineral land at the date the grant took effect is not recognized by the decisions of this Department.

All mineral lands were excepted from the grant, and this Department is the only tribunal clothed with authority to determine what lands are mineral, and when, as in this case, information is conveyed to me satisfactorily showing that any portion of the land included within the limits of the grant is mineral in character, it is my duty to so declare, and to authorize its entry under the mineral laws.

This jurisdiction is clearly vested in this Department, and until patent is issued (when patent is necessary to convey title) it is the imperative duty of this Department to exercise it. *Valentine v. Central Pacific R. R.*, 11 L. D., 238.

Your judgment is affirmed.

PRE-EMPTION ENTRY—CONFIRMATION.

BLACKBURN v. BISHOP ET AL.

An entry that is fraudulent in its inception, and is transferred prior to March 1, 1888, is not confirmed by section 7, act of March 3, 1891, where at the date of said transfer the entry is under attack as shown by the records of the local office.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

I have considered the motion made by S. W. Burnham, transferee, for a review of departmental decision dated May 1, 1891 (unreported),

in the case of *Thomas Blackburn v. James Bishop*, involving the SE. $\frac{1}{4}$ of section 2, T. 13, R. 39 W., North Platte, Nebraska. The record shows that Bishop made pre-emption cash entry No. 1292 of said tract on October 18, 1884, and certificate issued thereon. On November 27, 1885, Blackburn filed his affidavit of contest against said entry, alleging that the same was fraudulent and illegal for non-compliance with the requirements of law as to settlement, improvement and residence, and also because Bishop was the owner of three hundred and twenty acres of land in said State, and, therefore, was prohibited by law from making said cash entry (Section 2260, Revised Statutes U. S.). The decision sought to be reviewed sustained the contest and canceled the entry. Thereupon Blackburn, on May 22, 1891, exercised his preference right and entered the land under the homestead law.

On July 3, 1891, Burnham filed in the local office a motion for review, asking that said departmental decision be reconsidered, and the entry reinstated and approved for patent under section 7 of the act of Congress approved March 3, 1891 (26 Stat., 1095), for the following reasons:

(1st) Because at the time said entry was made there was no adverse claim to said tract.

(2nd) Because said tract was purchased on the 5th day of December, 1885, for a valuable consideration by the transferee in good faith, and without notice of any defects in claimant's title thereto.

(3rd) Because transferee received no notice of said contest.

With the motion was filed the duly certified copy of a deed from Bishop and wife, purporting to convey the tract to Burnham, in consideration of the sum of six hundred dollars, dated December 5, 1885; also the affidavit of Burnham, in which he swears that on said 5th day of December, 1885, he bought the tract from Bishop for a valuable consideration; that he is the identical James F. Bishop who made said cash entry No. 1292; that at the date of said purchase, Bishop had in his possession the "Receiver's final certificate for said cash entry," and that relying upon said certificate he [Burnham] purchased the tract "in good faith without notice of any defects in said Bishop's title to said tract of land; that on the 9th day of December, 1885, he filed said deed for record in the county clerk's office for Keith county, in said State, and the copy thereof presented with the motion is a true copy of the deed. It is insisted by Blackburn that the motion comes too late, because his contest has proceeded regularly from the date of its initiation nearly six years ago, up to the present time, and has resulted in a final judgment upon which Bishop's entry has been canceled, which judgment is binding upon the transferees, and Blackburn has been allowed to make entry of the land under the homestead law.

This entry cannot be confirmed under said seventh section for the reason that Burnham cannot claim to be a purchaser in good faith because at the date of his purchase an affidavit of contest had been filed in the local office, alleging the illegality of said entry, of which he was bound to take notice.

It seems to me that this case falls clearly within the rule announced in *Roberts v. Tobias et al.* (13 L. D., 556), wherein it is decided that an entry which is fraudulent in its inception, and is transferred and mortgaged by the transferee prior to March 1, 1888, is not confirmed by said section where at the date of said mortgage the entry is under attack as shown by the records of the local office. In the case at bar contest had been initiated at the date of the transfer, and as a result thereof, the entry was canceled, because it was held to be fraudulent in its inception. The transferee is bound to know the status of the land in the local office at the date of purchase.

The motion is therefore denied.

TIMBER CULTURE ENTRY—APPLICATION.

FREDERICK TIELEBEIN.

A timber culture contestant who files with his affidavit of contest an application to enter under the timber culture law initiates thereby an inceptive right that is protected by the proviso to the act repealing said law.

Corroborated affidavits showing that such an application was in fact filed may be accepted as conclusive, where the records in the local office do not disclose the fact of such filing, nor tend to contradict the showing made by the applicant.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

I have considered the case of Frederick Tielebein, on appeal from the decision of your Office, of April 8, 1892, holding for cancellation his timber culture entry for the NE. $\frac{1}{4}$ of Sec. 11, T. 101 N., R. 64 W., Mitchell, South Dakota, land district.

It seems that Tielebein, on May 1, 1889, initiated a contest against a timber culture entry covering this land, which was carried to a successful termination. On December 28, 1891, he was allowed to make timber culture entry for said tract upon his application, bearing date of that day.

It was said in the decision appealed from that the records of your office fail to disclose that Tielebein filed an application to make entry prior to the act of March 3, 1891 (26 Stat., 1095), by which the timber-culture law was repealed, and the local officers were directed, unless their records showed the filing of such an application, to notify him that his entry was held for cancellation. With the appeal from that decision, Tielebein has filed his affidavit, stating positively he made out his application, and all papers necessary to make timber-culture entry, and filed them with his affidavit of contest against the former entry on May 1, 1889. This statement is corroborated by H. C. Holmes, who, it is said, was acting as Tielebein's attorney in said matter.

These affidavits make a *prima facie* showing that an application to make timber-culture entry for this land was filed at the time the con-

test affidavit was filed, and that it has not been withdrawn or any rights initiated thereby relinquished by the applicant, and, if uncontradicted, may properly be treated as conclusively showing the fact.

Since the overruling of the case of *Bundy v. Livingston*, 1 L. D., 52, in the circular of June 27, 1887 (6 L. D., 280), a contestant of a timber-culture entry has not been required to file with his contest an application to enter, but in case he has so filed, he would by such filing initiate an inceptive right in case of his success under his contest affidavit, which would be protected by the proviso to the repealing act which provides: "That this repeal shall not affect any valid rights heretofore accrued, or accruing under said laws, but all bona fide claims lawfully initiated before the passage of this act may be perfected, upon due compliance with law," etc.

In view of the foregoing, your decision is modified as follows: You will direct the local officers that the application, upon which this entry was allowed, will be considered as a substitute for the one previously filed, and the entry thus made will be allowed to remain intact, subject to defects other than that presented in the decision here appealed from, and to compliance with the requirements of law, unless the records of the proper local office disclose something contradicting or tending to contradict the statements made in the affidavits referred to, to the effect that an application to enter was filed simultaneously with the contest.

MINING CLAIM—PLACER PATENT.

SOUTH STAR LODE.

The issuance of a placer patent, on a record which shows that there is no known lode or vein within the placer claim, precludes the subsequent allowance of a lode entry within said limits, while said patent is outstanding.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

The record shows that Noah J. McConnell *et al.* made mineral entry of the South Star lode claim, lot No. 363, Helena, Montana, land district, on September 1, 1887. Upon examination of the matter in the course of the business of your office, you decided, November 28, 1890, that:

This entry conflicts throughout its entire extent, with two entries, one of which, the Noyes Placer, Helena, Montana, mineral entry No. 511, was patented July 28, 1880, and the patent includes the ground in conflict.

The other conflict is with Helena, Montana, mineral entry No. 729, also the Noyes Placer, application for patent for which, (including the ground in conflict herewith) was filed September 12, 1881, more than five (5) years prior to this application.

This case clearly comes within the purview of the decision of the Department in case of the "Pike's Peak" Lode claim, (10 L. D., 200).

Under, and by virtue of the authority of said decision, said mineral entry No. 1572 is hereby held for cancellation.

From this judgment the applicants appealed, but subsequently, at the request of the applicants, the case was suspended, awaiting a decision from the local court upon an action brought, as stated by counsel, for the purpose of obtaining a judicial determination in favor of the lode claimants, to the effect that the lode claims were prior in right to the placer, and were, by force of the statute, excepted out of the placer application and patent, as in *Mantle v. Noyes*; and, in case of success, to enable the lode claimants to apply to the Department for an order that patents may issue for the lode claims.

Subsequently, on July 5, 1892, John Noyes and David N. Upton, representing themselves as owners of "placer lot 13," mineral entry No. 729, filed a formal abandonment of so much of said entry No. 729, as conflicts with the South Star lode.

On May 23, 1893, counsel for applicants filed a certified copy of a judgment rendered in the district court of the second judicial district of Montana, April 13, 1893, and certified to the following day, in a suit wherein Noah J. McConnell, *et al.* were plaintiffs, and John Noyes, *et al.* were defendants. By this judgment it was decided that the plaintiffs were entitled to the possession of the premises at the time of the commencement of the action, and that the defendants had no estate or interest therein. The premises are described by metes and bounds, and are thus shown to be the South Star lode as described by the official survey.

I am disposed to think that your objection on account of conflict with mineral entry No. 729 has been overcome by the abandonment of the territory in conflict by the owners thereof, and that the entry may be passed to patent so far as the conflict with entry No. 729 is concerned.

But if, as you state, and there is nothing to show to the contrary in the record before me, "mineral entry No. 511 was patented July 28, 1880, and that the patent includes the ground in conflict," then the Department is without jurisdiction over the land, because the government has parted with its title.

There is nothing before me that overcomes the objection you made when you first considered this matter, or that brings it within the terms of section 2333, Revised Statutes, as defined in the cases of *Reynolds v. Iron Silver Mining Co.* (124 U. S., 374), and *Noyes v. Mantle* (127 U. S., 348). In construing this section the supreme court has decided that where a vein or lode

is known to exist at the time within the boundaries of the placer claim, the application for a patent therefor, which does not also include an application for a vein or lode, will be construed as a conclusive declaration that the claimant of the placer claim has no right of possession to the vein or lode.

The judgment presented here does not show that the lode was "known to exist at the time" the ground was patented as a placer. Neither does the judgment show that the action was against the placer claimants, or that it involved any issue that would affect the prior patent. It declares that the "plaintiffs are the owners, and entitled to the possession, and

were such owners in possession, and entitled to the possession at the time of the commencement of this action." That being true, does not bring the case within the rule announced in the cases cited, especially in view of the fact that it does not give the date "of the commencement of this action."

I am of the opinion that your judgment should be affirmed, except as to the territory formally abandoned, and it is so ordered.

MINING CLAIM—PUBLICATION OF NOTICE—POSTING.

FREDERICK A. WILLIAMS (ON REVIEW).

Notice of application for mineral patent must be posted, during the period of publication, in the local office having jurisdiction over the land; and in the absence of such posting, a republication must be made in due accordance with statutory requirements.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

On the 14th of December, 1891, you rendered a decision on the application of Frederick A. Williams for patents on mineral entries numbered 20-21-22 and 23, (Ute Series) for the "New Fisherman," "New River Bend," "New Washington City" and "New Boston," placer claims, Montrose land district, Colorado.

After reciting at length the facts in connection with the various locations of claims on the land in question, and the applications for patents by Williams, you found that he filed four separate applications, but that the four locations were embraced in one survey. You held that a survey of each claim must be made, etc. It also appears that prior to September 1, 1888, the land in question was under the jurisdiction of the officers of the Gunnison land district, but that on September 1, under the operation of law, it was placed under the jurisdiction of the land office at Montrose, and the officers at Gunnison ceased to have any control over the same. In your decision you say:

The record shows that the notices of applications for patents in these cases were published from September 6, 1888, to and including November 8, 1888, that the land office at Montrose was opened for the transaction of business September 1, 1888, and that these claims are within that district.

Notices of said applications for patents and the plat of the claims remained posted in the land office at Gunnison, Colorado, during the period of publication, but no notices of said applications, nor the plat of the claims were posted in the land office at Montrose.

This omission makes it necessary for the claimant of the New Fisherman, New River Bend, New Washington City, and New Boston claims to give new notice of his application for patent in each case, by due publication in the newspaper, posting on the claims, and in the land office at Montrose, for the reason that during the pendency of these applications notices thereof should have been posted in the land office

of the district within which the claims were situated, as *all* persons who may have had claims affected thereby, had a right to rely upon the files and records of that office for data upon which to institute adverse proceedings, if necessary to protect their rights.

On December 5, 1892, this Department considered the case (15 L. D., 532), and held that the one consolidated survey was sufficient to support the four separate applications for a patent, and that no further survey of each claim was required; it was further said:

There is no adverse claim. . . . the question is therefore between the government and Williams. No rights of the public will be injured by allowing him to file one application, embracing the several claims, and make one entry thereof of *nunc pro tunc*. This will prevent adverse claims, which Williams has once settled; from being again presented, and obviate the necessity of further notice and publication. The case may then be sent to the board of equitable adjudication for confirmation.

After this decision was sent to your office, but before it was promulgated, you were instructed to hold the same in abeyance, and the parties interested have not been officially notified of its purport. The reason for this is the fact that Mr. Henry W. Blair has filed in this Department an affidavit, stating that he is a stockholder and director in the San Miguel Consolidated Placer Mining Company, that said company is, and has been for more than ten years past, the owner of the placer mining claims and premises, embracing the identical ground included in the applications of Williams, that said applications were fraudulently and illegally made, etc. It is also a fact that through a misunderstanding or inadvertence, Mr. Blair was not heard in argument, as he had a right to expect he would be, when the case was considered by the Department. He asserts an adverse claim, also fraud, conspiracy, and illegality on the part of Williams in making his locations and applications, etc.

The question of the merits of these claims is not one for discussion by this Department at this time. The first important question to be determined is, has the compliance with the terms of the law, by Williams, been such as entitles him to a patent. You found it had not.

On September 1, 1888, the land in question passed under the jurisdiction of the land officers at Montrose, in which district it was located. Notice to this effect had been published to the world—the public knew it; it is but reasonable to assume that Williams, who is evidently a sharp, keen, intelligent man, knew it, and above all, the local officers at Gunnison knew that they were to cease to have jurisdiction over the land on that day; yet, on August 30, two days before the land was to pass under the jurisdiction of the Montrose office, Williams filed his applications for patents at the Gunnison office, and the register issued notice of publication, knowing well that during the entire period of publication, the land would not be under his jurisdiction, which was the fact, as the first publication of said notice was on September 6. He also posted a notice in his office. No notice was posted in the Mon-

those office at any time, the office which had jurisdiction over the land during the entire period of publication, and during the entire period that the plat and notice were posted on the claim, as the evidence shows that said plat and notice were posted on September 6. It appears that adverse claims were filed in the Montrose land office, during the period of publication, thus showing that the jurisdiction of that office over the land was properly recognized by the public.

Section 2325, Revised Statutes, not only requires that the register of the proper office "shall publish a notice that such application has been made, for a period of sixty days;" but it also requires that "he shall also post such notice in his office for the same period." The "same period" means the sixty days of publication. Great Western Lode Claim (5 L. D., 510).

In this case, the period was from September 6, to November 8, and the only office where it could legally be posted, was the proper land office having jurisdiction over the land for the entire period of publication, in this case, Montrose. It did no harm to allow the notice which was posted in the Gunnison office, prior to the period of publication, to remain posted therein, neither would it have done any harm to have posted such a notice in the Denver land office, but the first act was not, nor would the second act have been, a compliance with the plain provision of the statute; for, as before stated, if the provision of the statute means anything, it means that the notice of application for patent shall be posted in the office having jurisdiction over the land during the period of publication. It is not necessary to speculate as to what questions would arise, had the period of publication commenced and run for a longer or shorter period of time *before* the jurisdiction over the land had been transferred to the Montrose office, neither is it necessary to speculate as to who was at fault in the matter of posting the notice, whether the register at Gunnison, whose plain duty it was to transfer said notice to the office which he knew had jurisdiction over the land during the entire period of publication, or whether it was the fault of the applicant, who must have known that the Montrose office had jurisdiction in the premises, and neglected to ascertain whether the provision of the law had been carried out, whoever may have been at fault, a plain requirement of the statute was not complied with.

Much has been said in support of the conflicting claims of the San Miguel Consolidated Placer Mining Company and Mr. Williams, but, as I have before remarked, I do not propose to enter into any discussion of these claims.

The mining law has carefully provided that the question of adverse claims and adverse rights shall be adjudicated by the court, the only tribunal where such claims can properly be adjudicated.

To allow patents to issue to Williams, without a strict compliance with the requirements of the statute, would be to deny to the adverse claimants the right to appeal to the courts for an investigation of their

claims. It appears in the light of later information furnished in this case, that the question is not one "between the government and Williams," solely, but the rights of others are involved, which should be investigated by a competent tribunal, which the law has wisely provided.

The decision of December 5, 1892, is therefore modified in so far as it allowed the applicant to file one application, embracing the several claims, and make one entry thereof *nunc pro tunc*, without further publication, but the applicant may file such application, which, however, must be published in due form, as required by law.

IVERSON v. ROBINSON.

Motion for review of departmental decision of January 19, 1893, 16 L. D., 58, denied by Secretary Smith, September 21, 1893.

PRICE OF LAND—RAILROAD LIMITS.

EDWARD D. MCGEE.

Under the act of September 29, 1890, forfeiting the odd-numbered sections granted to the Northern Pacific, within the over-lapping primary limits of the Oregon and California road, no rights of the latter road are recognized, and it therefore follows that the even-numbered sections within said forfeited limits are subject to disposition at the minimum price.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

With your letter of May 7, 1892, you transmit the appeal of Edward D. McGee from your decision of March 11, 1892, affirming the action of the register and receiver rejecting his final proof made December 16, 1891, for the NW. $\frac{1}{4}$ of Sec. 34, T. 5 S., R. 3 E., Oregon City, Oregon.

He filed his declaratory statement for the land October 27, 1890, and the proof as to settlement, residence, and cultivation appears to have been satisfactory, but it was rejected because the price tendered in payment for the land was only \$200, and the land was held to be double minimum in price.

This land is within the granted limits common to the grants for the Northern Pacific and the Oregon and California railroad companies, and opposite the unconstructed portion of the first mentioned road, the grant for which, so far as coterminous with unconstructed road, was forfeited by the act of September 29, 1890 (26 Stat., 496).

The respective rights of these companies within such conflict were considered in departmental decision of February 17, 1892 (14 L. D., 187), wherein it was held that:

The grant of the odd-numbered sections within the overlapping primary limits of the Northern Pacific, and Oregon and California roads, east of Portland, Oregon, was

for the benefit of the former company under the act of July 2, 1864, and the forfeiture thereof by the act of September 29, 1890, is to the extent of the withdrawal made under the sixth section of the act of 1864; and under said act of forfeiture no rights of the Oregon and California road are recognized within said conflicting limits.

(Syllabus.)

The greater part of the odd-numbered sections within such conflict had been, prior to the forfeiture, patented to the Oregon and California Railroad Company, and for the recovery of the same suit has been instituted in the proper courts. Pending the determination of such suit, the disposition of the odd-numbered sections in said conflict has been suspended.

It having been held that such odd-numbered sections were, by the act of September 29, 1890 (*supra*), forfeited, under the 3d section of said act all parties in possession of any of said lands, under deed, written contract with, or license from the company, executed prior to January 1, 1888, or who had settled with *bona fide* intent to secure the same by purchase when earned by the company, will be entitled, when such lands are opened for disposition, to purchase the same from the United States, in quantities not exceeding three hundred and twenty acres at one dollar and twenty-five cents per acre.

It must be held, therefore, that by such legislation it was the intention of Congress to open the *odd-numbered* sections, or forfeited sections, at one dollar and twenty-five cents per acre. Thomas A. Holden (16 L. D., 493).

Being a part of the grant until the forfeiture, no price had previously been placed on such lands.

With this history of the odd-numbered sections in said conflict, I will proceed to the consideration of the even-numbered sections, a portion of which is here in dispute.

By the 4th section of the act of March 2, 1889 (25 Stat., 854), it is provided:

That the price of all sections and parts of sections of the public lands within the limits of the portions of the several grants of lands to aid in the construction of railroads which have been heretofore and which may hereafter be forfeited, which were by the act making such grants or have since been increased to the double minimum price, and, also, of all lands within the limits of any such railroad grant, but not embraced in such grant lying adjacent to and coterminous with the portions of the line of any such railroad which shall not be completed at the date of this act, is hereby fixed at one dollar and twenty-five cents per acre.

It is plain that the language of said section embraces the land in question, for it is within the limits and opposite the portion of the grant for the Northern Pacific Railroad, which was forfeited by the act of September 29, 1890 (*supra*), and is not embraced in such grant lying opposite the completed portion of such road.

If there was doubt in this matter, it would seem that the provision for the disposition of the odd sections forfeited by the act of September 29, 1890 (*supra*), which were those opposite unconstructed road, should, for the sake of uniformity, guide the disposition of all lands within the

forfeited limits, and should be held subject to entry at one dollar and twenty-five cents per acre.

If, as stated by the supreme court in the case of the United States *v.* the Missouri, Kansas and Texas Railway Company (141 U. S., 358), these even sections were increased in price, in order to reimburse the United States, to some extent, for the lands granted, then with the forfeiture and resumption of title to the odd-numbered sections, the necessity for the increase in price in the even sections disappears, and, with the odd-numbered sections restored to the public domain by the forfeiture act, should be disposed of as other public lands, viz: at the minimum price. I must therefore reverse your decision, and direct the allowance of McGee's proof, if in other respects regular and satisfactory.

ROWE *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. Co.

Motion for review of departmental decision of April 10, 1891, 12 L. D., 354, denied by Secretary Smith, September 21, 1893.

SCHOOL LAND-INDEMNITY SELECTION.

STATE OF CALIFORNIA *v.* GOMEZ.

The selection and approval of school indemnity divests the State of all title to the alleged basis, which is thereafter open to settlement and entry.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

The record in the case of the State of California *v.* Evaristo Gomez is before me on appeal of the former from your decision of June 5, 1890, in which you reverse the action of the register and receiver in rejecting the application of said Gomez to make homestead entry of lots 3 and 4, of Sec. 16, T. 3 S., R. 13 W., S. B. M., Los Angeles, California.

By the first survey, made in February, 1868, and approved March 26, of that year, all of said section 16 appeared to be in the Rancho Tajauta; and, on September 28, 1869, the State selected the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 29, T. 1 S., R. 1 W., S. B. M., in lieu of the SW. $\frac{1}{4}$ of that section, and the same was approved by the Secretary of the Interior, November 24, 1871, in list No. 1.

A second survey of said section was made in 1873, and approved March 25, 1874. It showed a small strip on the west side of said section outside of the rancho, and this strip was platted as lots 1, 2, 3, and 4.

On April 14, 1876, lots 3 and 4 of said strip being in the SW $\frac{1}{4}$, were patented by the State to George Hansen, and he appears to have transferred to Benson Lossing on October 21, 1886, since which time the lat-

ter has continuously resided thereon, having improvements valued at \$1100.

On January 5, 1890, Evaristo Gomez made application to make homestead entry of the said lots (3 and 4). The register and receiver rejected his application, "for the reason that the land applied for is part of a school section, which inured to the State as a school grant." He appealed and you reversed that finding, and directed that his application be accepted as of the date when presented for filing.

The second section of the act of March 1, 1877 (19 Stat., 269), provides as follows:

That where indemnity school selections have been made and certified to said State (California), and said selection shall fail by reason of the land, in lieu of which they were taken, not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth or thirty-sixth section, in lieu of which the selection was made, shall, upon being excluded from such final survey, be disposed of as other public lands of the United States.

The purpose of this statute was to confirm to the State its selections of lieu lands, when the bases were defective.

When the State selected the lieu lands for the SW. $\frac{1}{4}$ of said section, and the same was approved (November 24, 1871), it received its equivalent for that quarter section, and thereafter had no right or title in it; and when, in 1876, Hansen bought the lots, he obtained no title, because his vendor, the State, had none to confer upon him. It is not true, therefore, that "the land had been sold by the State while within its disposable power."

The selection and approval of the lieu lands divested the State of all title in the alleged basis—the said SW $\frac{1}{4}$. The lots in question were thereafter open to settlement and entry. *Henderson v. Moore*, 12 L. D., 390; *State v. Dent*, 18 Mo., 313; *Thomas E. Watson*, 6 L. D., 71; *State of California*, 7 L. D., 270; *Thomas F. Talbot*, 8 L. D., 495; *D. C. Powell*, 6 L. D., 552; *Henry Wilds*, 8 L. D., 394.

The application to make entry of the same will be received.

The decision appealed from is affirmed.

RAILROAD GRANT—EXPIRED FILING—INDEMNITY SELECTION.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO., ET AL. *v.* MUNZ.

Land included within an unexpired pre-emption filing is excepted thereby from the operation of a railroad grant, either on definite location or withdrawal for indemnity purposes.

An expired pre-emption filing is no bar to an indemnity selection if no claim or right is asserted under such filing.

A tract of land within the primary limits of one grant, and the indemnity limits of another, may be selected by the latter, on proper basis, if excepted from the grant to the former, and free from other claims at date of selection.

The specification of a loss is a pre-requisite to the legal assertion of the right to select indemnity; and, an application to select, not based on a specified loss, is no bar to other disposition of the land.

The departmental order of May 28, 1883, permitting the Northern Pacific company to make indemnity selections without a specification of losses, is applicable only to lands protected by withdrawal.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

I have considered the record forwarded with your office letter of June 23, 1893, in the case of the St. Paul, Minneapolis and Manitoba Railway Company and the Northern Pacific Railroad Company *v.* Emil Munz, involving the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 33, T. 134 N.; R. 43 W., St. Cloud land district, Minnesota, on appeal by said company from your office decisions of April 22, 1887, and December 19, 1891, rejecting the claims of said companies.

This tract is within the primary limits of the grant for the Manitoba Railway Company, the rights of which attached, in said limits, upon the acceptance of its map of definite location on December 19, 1871.

It is also within the indemnity limits of the grant for the Northern Pacific Railroad Company upon the definite location of its line of road in this vicinity, on account of which a withdrawal was ordered by letter of December 26, 1871, received at the local office January 10, 1872. It was not, however, included in either of the withdrawals upon general route.

On July 10, 1871, one Charles Kankel filed pre-emption declaratory statement for this land, alleging settlement same date, which is still on record uncanceled.

On December 29, 1883, the Northern Pacific Railroad Company applied to select this, with other lands, and upon the rejection of the list said company appealed to your office.

On July 31, 1884, the Manitoba Railway Company also applied to list the land on account of its grant, and upon the rejection of said list it also appealed.

One Sivert Opsahl, on August 12, 1885, applied to enter this land, and upon the rejection of his application he also appealed, and this appeal, together with that by the Manitoba Railway Company, was considered in office decision of April 22, 1887, which held that the filing by Kankel, being a subsisting claim on December 19, 1871, served to except the land in question from the grant for said Manitoba Railway Company, but sustained the rejection of Opsahl's application because filed pending the company's appeal.

In the decision of April 22, 1887, no mention was made of the claim on account of the Northern Pacific grant. From this decision the Manitoba Company appealed, but said appeal being overlooked, the case against the company was closed by letter, of December 8, 1891, and,

under this letter, Emil Munz was permitted to make homestead entry of the land on December 16, 1891.

On finding the appeal by the Manitoba Company, your office on December 19, 1891, revoked the action taken in letter of December 8, 1891, in closing the case, and then considered the appeal by the Northern Pacific Railroad Company sustaining the rejection of its selection.

From this action the Northern Pacific Railroad Company appealed, and the entire record is now before me.

It has been repeatedly held by this Department, that an unexpired pre-emption filing, existing at the date of withdrawal or of the attachment of rights under a railroad grant, excepts the land covered thereby from such withdrawal and the grant. Northern Pacific Railroad Company *v.* Stovenour, 10 L. D., 645, and cases therein cited.

Kankel's filing of July 10, 1871, was an unexpired claim on December 19, 1871, the date of the definite location of the Manitoba railroad, and also at the date of the withdrawal for the Northern Pacific Railroad; hence, it served to except the land in question from the grant for the first-mentioned company, and the indemnity withdrawal for the latter, but upon the expiration of said filing, in the absence of any showing of further claim on account thereof, the land was subject to selection by the Northern Pacific Railroad Company, if made in proper manner—i. e., after a showing that the company was entitled to make such selection.

On December 29, 1883, the Northern Pacific Railroad Company applied to select this land. At this time there was no valid claim to the land, as far as shown by the record, but in such selection list the company failed to specify a basis for the selection, and had not, to the date of your office decision, shown itself to be entitled to so select the land as applied for.

The company claims the protection of the order of this Department, dated May 28, 1883, permitting this company to make indemnity selections without a specification of losses, but, as was held in the case of said company against John O. Miller (11 L. D., 1, and 428):

The departmental order of May 28, 1883, did not contemplate the selection of lands subject to settlement without designating the basis therefor, but was applicable only to such lands as were protected by withdrawal. (Syllabus).

It is further urged by the company that its selection list having been rejected because of conflict with another grant, it should first be determined whether the lands are subject to the selection, before it should be required to specify a loss as a basis for such proffered selection, and that a reasonable time should be allowed for such purpose, after notice to the company.

Without a loss to the grant, there is no right in the company to make selection as indemnity, and such loss must be shown preliminary to the assertion of such right.

At the time of the proffered selection, the company claimed that the

right to indemnity existed, but failed to show a loss to support the right. The selection was not protected by the order of May 28, 1883, and being incomplete was no bar to further disposition; hence, the entry by Munz was properly allowed, and the rejection of the company's selection must be affirmed.

Your office decisions rejecting the applications by both companies to list or select this land are affirmed.

PATENT—JUDICIAL PROCEEDINGS TO VACATE.

LEAD CITY TOWNSITE *v.* MINERAL CLAIMANTS.

Judicial proceedings may be properly instituted for the vacation of a patent issued by inadvertence or mistake during the pendency, on appeal, of a contest involving the land in question.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

On January 26, 1893, you forwarded to this Department the papers in the appeal by claimants of mineral entry No. 245, made January 21, 1887, at Deadwood, Dakota, by John O'Connell *et al.* for the Little Nell lode claim, in the case of Lead City Townsite, South Dakota *v.* Mineral Claimants, from your decisions of June 5, and December 2, 1891, in the former of which said entry No. 245 was held for cancellation, on the ground that the land covered thereby did not appear to be valuable for mineral, and by the latter decision, the motion for review of said former decision was denied.

You state, and the record so shows, that said case involved a large number of mineral claims, and upon the evidence adduced at the hearing, most of them were held for cancellation on the same day as the Little Nell; that upon a motion for review a hearing was allowed as to some of said mineral claims and refused as to others.

You further state that afterwards a compromise was made by the parties in interest, and the mineral claimants were allowed to submit new *ex parte* proof as to the discovery of valuable mineral on their claims since said hearing, and after the same were considered, said decisions were revoked, except as to the Little Nell lode claim. It is further stated that the contest having been closed as to the parties to said agreement, their entries were considered and passed to patent; that "Through inadvertence, and the name Little Nell being confounded with Little Nettie, one of the compromise claims, the surveyor general having written it on the plat as the Little Nettie, said Little Nell was patented November 16, 1892, and the patent forwarded to the local office;" that on December 17, 1892, the local officers were directed to return the patent, if in their possession, and if not, to request the party holding the same to return it "on the ground that it was issued through

mistake;" that the local officers by letter dated, December 23, 1892 reported that the patent had been delivered to the attorney for claimant, and that he declared that he had parted with the patent.

On January 23, 1893, the attorneys for the townsite claimants filed in your office a petition asking that suit be instituted by the United States for the vacation of said mineral patent issued November 16, 1892, for the Little Nell lode mining claim, and you forwarded the same on the same day, recommending that the petition be granted.

Both the local officers and you found from the testimony taken at the hearing that the Little Nell lode claimants were not entitled to a patent and that said entry No. 245 ought to be canceled. The evidence submitted is voluminous and much of it contradictory, but after a careful examination of the same, it does not appear that the findings of fact, as to said claim, of your office and the local office, are clearly wrong, and in such cases they will be held to be conclusive by this Department. The facts in the case at bar are very similar to those in the case of the *United States v. Reed et al*, decided by the circuit court for the district of Minnesota, on December 23, 1892, wherein it was held that—

On a proceeding by the United States to cancel a patent inadvertently issued pending appeals by other claimants, the government is not bound to show that the other claimants would be successful in their appeal, but is entitled to have the patent canceled, unless the patentee proves that by the law properly administered he would be entitled to the patent, and it is doubtful whether even such proof would be admitted.

In the memorandum attached to the opinion the learned jurist says—

The government can sustain a suit in equity to set aside a patent or cancel it when its duty to the public requires such action. The undisputed facts in this case show that by the inadvertence and mistake of a subordinate clerk the Interior Department was disabled from performing its function and discharging its legal duty to review contests properly brought before it. It was contemplated that the land department should consider contests like the one pending before it. A constructive fraud was perpetrated by the acts of subordinates, in the department. A court of equity can not be called upon to exercise its jurisdiction in a case more appropriate. When the legal rights of the parties have been changed by inadvertence and mistake, equity restores them to their former condition, when it can be done without interfering with new rights acquired on the strength and faith of the altered condition of the legal rights, and without injustice to the parties.

Since said patent was issued through inadvertence and mistake, it would seem to be eminently proper that the United States should institute suit to annul and vacate the same. I therefore concur in your said recommendation, and you will accordingly prepare the proper record for submission to the Department of Justice, and transmit the same to this Department.

HOMESTEAD—FINAL CERTIFICATE—INDIAN WIDOW.

STRAIN *v.* HOSTOTLAS (ON REVIEW).

The widow of a deceased homesteader having submitted final proof showing full compliance with the law secures thereby the equitable title to the land involved, and delay in the issuance of final certificate will not affect her rights. In the event of her subsequent death the equitable title descends to her heirs.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

Winfield D. Strain has filed a motion for review of the case of Winfield D. Strain *v.* Jane Hostotlas (16 L. D., 137), alleging—

1. That the claimant Hostotlas was dead at the date said decision was rendered (February 15, 1893), leaving no child or children by her husband, Alonzo Hostotlas, who was the original entryman.

2. That it was error to hold in said decision that the marriage between Jane Hostotlas and Alonzo was a legal marriage, because that said Alonzo had another wife living at the date of his said marriage with Jane.

The facts are, briefly, as follows:

November 18, 1878, Alonzo Hostotlas, an Indian, made homestead entry for the E. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 13, T. 17 N., R. 1 W., Humboldt, California, under section 15 of the act of March 3, 1875 (18 Stat., 420). He resided on, improved and cultivated the land until January 30, 1889, when he died. Until about 1884, he lived with an Indian woman by the name of "Mary." At that date she left him, and went to live with a half-breed, known as "Crazy George." Afterwards, date not given, he married "Jane," and they continued to live together as husband and wife on the land until his death in 1889.

At his death he had fully complied with the homestead law.

March 17, 1890, Jane offered final proof as the widow of the entryman. Strain appeared and protested against the acceptance of her proof, upon the ground that she was not the widow of the entryman. The local officers found in favor of Jane, and dismissed his protest, and approved her final proof, and, on appeal, your office affirmed their action, and, on further appeal, this Department concurred in your judgment, and referred the case to the board of equitable adjudication for approval, more than seven years having elapsed from date of entry, and now Strain moves for a review of said departmental decision.

As to the legality of the marriage between Hostotlas and Jane no new matter, either of fact or law, is submitted in the motion, and as that matter was fully and, as it seems to me, correctly considered in the former decision of this Department, no further attention will be paid to the second ground of error.

It is shown by the record that Hostotlas left no heir, except "Jane," his wife, and it is contended by counsel for Strain that upon the death

of the widow of the entryman the land embraced in the entry descends only to the heirs of the entryman, and in no event can it go to the heirs of the widow, unless her descendants are also the heirs of her husband, the entryman.

The affidavits accompanying the motion for review show that at her death in 1892 she left one child, the offspring of a white father, with whom she lived before marrying Hostotlas.

Counsel for Strain contend that this child not being the heir of the entryman, Hostotlas, is not entitled to the land, and invoke sections 2291 and 2292 of the Revised Statutes in support of such contention.

Section 2291 provides for the making of final proof, and who may make it, etc.

In the case at bar proof was made by the widow, in the manner pointed out in said section. Her proof was approved by the local officers, but final certificate was withheld, because of the appeal of Strain, who contested her right to final certificate solely upon the ground that she was not the lawful widow of the entryman.

Had she died before making final proof, his heirs, not her's, would have been authorized to make proof and receive patent. (Alcott's Heirs, 13 L. D., 131.) But she having in her lifetime made proof showing full compliance with law, the equitable title, *eo instanti*, vested in her, notwithstanding final certificate was not issued to her. She had done all the law required of her, and it was not her fault that the final certificate was not thereafter issued to her.

Her right depends upon her compliance with the requirements of the homestead law, namely: that she and her husband had resided upon the land the necessary length of time, made the required improvements and cultivation, and submitted proper proof thereof. This done, the final certificate issues as a matter of course, and in itself is merely evidence of a compliance with law. When she had complied with all the requirements of the law and submitted proof of such compliance, she was entitled to patent, and the final certificate is merely evidence of that fact. (See *Cornelius v. Kissell*, 128 U. S., 456; *Wirth v. Branson*, 98 U. S., 118; *E. Querbach*, 10 L. D., 142, and cases there cited.)

The equitable title having vested in her on January 26, 1891, date of approval of her final proof, it descends to her heirs upon her death, according to the laws of her domicile.

The motion for review is denied.

PRACTICE—NOTICE OF DECISION—REVIEW.

RODGERS v. HERINGTON.

Where notice of a decision is given by the local office through the mails ten days additional will be allowed for filing motion for review.

A motion for review not filed and served within the period prescribed by the rules of practice will not be entertained against the objection of the opposite party.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

On the 5th of April, 1893, you transmitted, on the part of James Herington, motion for review of the decision of the Department, rendered on the 6th of January, 1893 (unreported), in the case of Thomas Rodgers against said Herington, in which your decision of November 21, 1891, accepting the final proof of Rodgers and rejecting that of Herington for the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 8, T. 27 S., R. 26 E., Visalia land district, California, was affirmed.

Notice of the decision of the Department was served by the local officers upon Herington, by registered letter, on the 24th of January, 1893, and the motion for review was filed in the local office, and a copy delivered to the attorney for Rodgers, on the 6th of March, 1893.

Rule 77 of Practice, provides that motions for review must be filed and served within thirty days from notice of the decision of which a review is sought, except when based upon newly discovered evidence.

Rule 87 provides that when notice of the decision is given through the mails by the register and receiver, five days additional will be allowed by those officers for the transmission of the letter, and five days for the return of the appeal through the same channel.

A motion is made by the attorneys for Rodgers, to dismiss the motion for review of Herington, on the ground that it was not filed and served in time. Rule 77 of Practice is quoted, and it is then said:

It will be noticed that the ten days allowed for transmission of notice by mail in cases of appeal is not applicable to motions for review, and departmental decisions in the case of Alfred Magnusen, 10 L. D., 43, and Epley v. Trick, 10 L. D., 413, establish this proposition.

Before considering the motion to dismiss, it seems proper to say, that neither of those cases establish any such proposition. They simply hold that motions for review, except when based on newly discovered evidence, must be filed within thirty days from notice of the decision. It does not appear that in either of those cases notice of decision was served by mail, or in any other manner than personal. They are quoted, therefore, to sustain a proposition, which, so far as I am aware, has never been held by the Department, and which is directly opposed to Rule 87 of Practice.

The motion for review of Herington is not based upon newly discovered evidence, and it should, therefore, have been filed and served

within forty days from, and after the 24th of January, 1893. After the 24th, there were seven days in January. In February there were twenty-eight days, which, added to the seven in January, make thirty-five. This would make the 5th of March the last day within which to file and serve motion for review. It was not sworn to, served or filed until the 6th of that month.

The fact that it was sworn to before the receiver, would indicate that it was filed personally, and not returned "through the same channel" as the notice of decision was transmitted, but I see no reason for holding that this fact would change the rule allowing additional time, where notice of the decision was served by the local officers through the mails.

My conclusion is, that Herington had forty days from and after the 24th of January, 1893, within which to file and serve his motion for review, and not having filed and served the same within that time, it is hereby dismissed.

SCHOOL LAND-INDemnITY SELECTIONS.

McNAMARA ET AL. v. STATE OF CALIFORNIA.

Under the provisions of the act of February 28, 1891, school indemnity selections, resting on bases in part defective, may be approved, the defect being due to the failure of the government to properly mark the boundaries of an Indian reservation.

Secretary-Smith to the Commissioner of the General Land Office, September 21, 1893.

With your letter of May 6, 1891, you transmitted to the Department the papers in the case of M. J. McNamara *et al.* v. State of California, upon the appeal of McNamara from your decision of December 9, 1890, rejecting his application and that of others to make entry of certain tracts of land in sections 25 and 26, T. 14 N. R. 1 E., Humboldt, California, for the reason that the tracts applied for had previously been selected by the State of California as indemnity in lieu of certain school sections alleged to be within the Klamath River Indian Reservation.

In their appeal the applicants alleged that the parts of the bases used for said selections are school lands in place, and contend that said bases being defective in part, are defective as a whole, and the entire selection must fail.

This reservation was described in the order of the President as a strip of land, commencing at the coast of the Pacific ocean and extending one mile in width on each side of the Klamath river and up said river twenty miles. The exact boundary of the reservation has never been defined by survey, but the public surveys have been extended over the territory out of which it was created, and the limits had been approximated by drawing a line on the township plat about what was

supposed to be a mile distant from the river on each side thereof. It was alleged by appellant that if a correct line was drawn, some of the smallest legal subdivisions of the bases used would be shown to be outside of said reservation. As it could not be determined from the record or from the limits as marked on the township plat that the legal subdivisions used in said bases were within one mile from the river and embraced in the reservation, I directed by my decision, dated April 8, 1892, that a plat be prepared of said township, and that the lateral limits of this reservation be ascertained by concentric circles described from a series of points on each of the shores of the river, in the same manner that railroad limits are ascertained, and that if it shall then appear that any of the subdivisions fall outside of said reservation, you will report the same to the Department, with your views thereon, and give notice to all parties in interest.

I am now in receipt of your letter of May 11, 1892, returning the record in said case, with a map of the Klamath River Indian Reservation, prepared in accordance with the directions contained in my letter of April 8, 1892, with your report thereon, from which it appears that part of the school sections designated in said bases are not included within the limits of said reservation, and the bases are defective to that extent. The subdivisions used as bases and falling outside of the reservation are as follows:

No. 1695, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 16, T. 13 N., R. 2 E.; No. 1696, SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 16, T. 12 N., R. 2 E.; and 27.92 acres of the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 36, T. 12 N., R. 2 E.; No. 1698, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 16, T. 13 N., R. 1 E., and the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 16, T. 13 N., R. 2 E.

While it is shown that the bases for the selections 1695, 1696, and 1698 were defective, yet at the date of the selections the tracts now omitted were within the approximate limits of said reservation, as designated by the land office. All of the lands falling within said limits were treated by the Department as in reservation, and the State was evidently misled in designating said defective bases, because of the failure of the government to properly mark said limits.

At the date of the applications of appellants, the lands in controversy were embraced in the selections made by the State upon a basis *prima facie* valid, and, while a basis defective in part is defective as to the whole, yet, in view of the fact that the bases were at the time of the selection considered as in reservation, and as, under the act of February 28, 1891 (26 Stat., 796), the State may be held to have waived its right to the school sections by making selections in lieu thereof, I see no reason why, in view of the facts above stated, and of the provisions of the act of February 28, 1891, these selections should not be approved in lieu of the bases designated therefor, it not being in violation of any right acquired by appellants under their rejected applications, provided the State has not sold said bases.

It being alleged by appellants that some of the bases have been sold by the State, you will therefore notify it that upon furnishing satisfactory evidence that it has not conveyed or attempted to convey the bases designated for said selections, and filing a relinquishment of its right and title to such parts as are without the limits of the reservation, the selections will be approved; otherwise, the list of selections should be rejected and canceled.

Your decision of December 19, 1890, is modified.

PRACTICE—RIGHT OF APPEAL—CERTIORARI.

SUSIE B. MOORE ET AL.

The right of appeal is properly denied where it is sought to be exercised by one who is not a party to the pending controversy, and discloses no right to be heard as an intervenor.

An application for writ of certiorari will not be granted where it is apparent therefrom that the appeal asked for would be dismissed if before the Department.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

Counsel for Susie B. and Joseph B. Moore have presented a petition for a writ of certiorari requiring you to forward their appeal and the record to this Department in the case of "Townsite of Lead City v. Mineral Claimants."

A recital of such of the facts only as bear upon the merits of this application are necessary.

It seems that on March 3, 1885, cash entry was made at Rapid City, Dakota, of the townsite of Lead City, in the name of the Probate Judge of Lawrence County, Dakota, for the use and benefit of the inhabitants of said town. As shown by a certified abstract of title presented by counsel for mineral claimants and for the townsite. Susie B. Moore became the owner by purchase of lot 10 in block "B" May 20, 1887. Subsequently there were contests initiated between the owners of several mining locations included within the boundaries of Lead City on the one side, and the townsite claimants on the other.

It is not necessary to trace in detail all the proceedings had. Suffice it to say, your office decided June 5, 1891, that several of the mining locations involved in the controversy, including the "Golden Reef," should be canceled. The lot claimed by Mrs. Moore is situated within the boundaries of the Golden Reef. From this decision there were several appeals taken by the mineral claimants, including the Golden Reef; also an appeal by the townsite claimants; also motions for review on the part of a number of the mineral claimants. In deciding the motions for review, your office, on December 2, 1891, vacated the former decision as to the claims named, and ordered a hearing for the

purpose of determining whether (1) the lands embraced in the townsite entry were known to be valuable for mineral at the date of the townsite entry; and (2) known to be valuable for mineral prior to their use and occupation for residence and business purposes. The result of that decision was that the contending parties entered into an agreement whereby they agreed to compromise all their differences, and to settle amicably the disputes over which they had been contending. This agreement was dated May 23, 1892.

On March 26, 1892, there was a paper filed, presumably in the local office, as it is addressed to the register and receiver, entitled, "protest of Susie B. and Joseph B. Moore against proposed compromise." This protest states that "you are hereby notified" that the persons named are the owners of "lot 10 in block B in South Lead, an addition to the townsite of Lead City," and as such, protest against the settlement of this controversy "according to the terms of a so called compromise agreement that the townsite committee of Lead City, who are pretending to represent the said townsite of Lead City, are attempting to enter into by and through their attorneys; that they dispute the right of said committee or the attorneys" "to bind any one, especially these protestants," by this so-called compromise agreement; that they protest against the issuance of a patent to the mineral claimants to any of the mining claims, and especially against the issuance of a patent to the Golden Reef, "that has been declared non-mineral, or more valuable for townsite than for mining purposes;" "and these protestants and contestants do present the nature of their adverse claim, and do fully set forth the same in the affidavit hereto attached, marked 'Exhibit A,' and made part of this protest." The prayer of said protest is "that no settlement of the controversy herein be allowed under the terms of this proposed and so-called 'compromise agreement' without the signature of each and (every) property owner of property in the townsite of Lead City being first had and obtained."

In the affidavit referred to it is said, among other things, "that said decision (in reference to the Golden Reef mining claim) of the Commissioner of the General Land Office has been appealed from and appealed to the Hon. Secretary of the Interior Department by mineral claimants."

On October 5, 1892, this matter was again taken up, on a petition and stipulation "by the attorneys and a select committee, on behalf of the parties litigant," setting forth the terms of a compromise agreement that had been entered into between the townsite claimants and the owners of the several mining claims, by which it was agreed, among other things, that the townsite entry should be withdrawn and canceled as to the conflict with the Golden Reef, and others named. Your office then decided that before the compromise and petition could be acted upon, all appeals must be regularly withdrawn, so as to restore the jurisdiction of your office, and the compromise must be signed by

all the parties shown to have any interest in any portion of the land covered.

On October 22, 1892, attorneys representing both the townsite and mineral claimants presented a motion for the reconsideration and review of said letter of the 5th instant, on the ground of the "enormous expense" it would entail to get the signature of all property owners to the compromise agreement, and the preparation of the plat and abstract of title, all of which would seriously impair and jeopardize the material prosperity of all concerned, because the "compromise is signed and entered into by all the parties who brought about the hearing," and who have borne all the expenses incident to this controversy;

Because under certain contracts, stipulations and conveyances, duly made and entered into in writing between the townsite claimants on the one hand and the mineral claimants on the other, in furtherance of the said agreement and stipulation of compromise, the private rights of property of all parties, whether claiming under the townsite law or the mineral law, are fully and amply protected and secured.

In passing upon this motion, October 28, 1892, your office stated that all appeals had been withdrawn, as required, and said, *inter alia*,—

A thorough examination of the compromise and its effects convinces me that the private rights of property of all parties, whether claiming under the townsite or mineral law, is amply protected and secured thereby, and not wishing to throw any obstacle or hindrance in the way to a speedy adjustment of this matter, I have decided, upon the showing made, to modify said decision by revoking said requirement, and will now proceed to consider the motion to cancel a specified portion of the townsite entry and award the same to the mineral claimants.

* * * * *

As to the protest of Joseph B. Moore and wife, setting forth the illegality of the compromise and that it was consented to by the townsite parties through fear of incurring the disfavor of the mineral claimants should they dissent therefrom, I must hold that said protest is too general in character to warrant this office in taking any action thereon further than to dismiss the same, which is hereby done.

* * * * *

In consideration of the aforesaid compromise agreement, and not being unmindful of the fact that the courts look with favor upon a compromise, I am forced to the conclusion that the evidence now before this office shows satisfactorily that the claims in the controversy are valuable for mining purposes, therefore all the proceedings in the matter of hearing had in this case are hereby vacated and set aside, and office decision of June 5, and December 2, 1891, are accordingly revoked.

The mineral claims having thus been shown to be valuable and the land covered thereby not subject to townsite entry, said cash entry No. 825, for the Lead City townsite, is hereby held for cancellation to the extent of conflict therewith, described by metes and bounds as follows:

From so much of this decision as dismissed said protest, the Moores appealed, assigning numerous grounds of error, and by office letter of March 10, 1893, the right of appeal was denied. It is by reason of this action that counsel asked for a writ of certiorari, alleging several grounds of error, covering nearly all the decisions in the controversy, which, in my view, have no bearing on this proceeding at all.

The original controversy here was one between the townsite and mineral claimants, and the sole question was as to the character of the

land. The parties in interest saw fit to compromise their differences in such a manner, as stated in the decisions and by counsel for both sides of the original controversy, "that the private rights of property of all parties, whether claiming under townsite or mineral law, is completely protected and secured." This proposition is not denied by the applicants herein.

One of the specifications of error upon which this application is based, is that the judgment of June 5, 1891, canceling the Golden Reef location, has become final, there having been no appeal taken therefrom. The so-called protestant says that the appeal was taken. Both statements are under oath; both affiants are attorneys, and presumed to know the details of the matter in hand. With this contradictory statement before me, it became necessary to informally examine the record of the appeals in your office, and I find that an appeal was taken from the decision in reference to the Golden Reef. The matter in controversy between the townsite and mineral claimants, as to this particular claim, was, therefore, still alive, and the mineral claimants had the undoubted right to withdraw their appeal and effect a compromise, if they desired.

What position do the Moores occupy in this controversy? As shown by the abstract of title to the lot they claim, Sue B. Moore became the owner of the lot in May, 1887. The original proceeding was initiated in July, of the same year, and the hearing was first ordered for September, 1888, but the testimony was not taken until May, 1889. The first decision in your office was rendered in June, 1891, and the second in December, of the same year. During all this time, and until March, 1892, the Moores were silent, so far as the record discloses, and, presumably, acquiesced, as did all the other residents, with one exception, in the proceedings. Now at the latter date they come in with an objection to the compromise that the parties litigant have effected. All they ask is that no "settlement of the controversy" be allowed without the signature of all property owners. What controversy? Why, the one pending between the townsite and mineral claimants, and in which they were not parties. They are called, interchangeably "protestants," "contestants," and "intervenors," without apparently being able to determine among themselves just what their legal status is. These terms have well defined meanings in our practice, and parties should bring themselves within the rules prescribed, in order to get before the Department.

The Moores cannot be considered as "intervenors," because they do not seek to be made parties to the action. "Intervention" is defined to be "the act by which a third party becomes a party in a suit pending between other persons." (Bouvier's Law Dic., Vol. 1, 834.) It is not necessary to discuss this proposition, however, as counsel say, "our clients, therefore, are not, strictly speaking, intervenors," but they claim that "they have been in the case, as parties plaintiff, by their agents, all the time."

They are not "protestants" in the legal meaning of that term, for the reason that they do not allege any failure on the part of any one connected with the procurement of the government title to comply with the law, neither do they allege any fraud as against the government. It needs no argument to show that they are not in any sense "contestants."

It seems to me that it is idle to argue that a mere "objector" to proceedings, over which the Department has no jurisdiction, such as a compromise between litigants, as in this case, has any right to be heard on appeal, especially where it is shown that he has not brought himself within any rule of law or practice that would entitle him to a standing in court, and where, in fact, he does not seek to be made a party.

I am of the opinion that the applicants herein have not made such a showing here as would entitle them to be made parties to the action. That being the conclusion, it follows that they cannot be permitted to prosecute an appeal.

Therefore, without discussing any other question that might be suggested in this proceeding, this application must be denied, because it is apparent that the appeal asked for would be dismissed if before the Department. (*Forney v. Union Pacific Ry. Co.*, 11 L. D., 430.)

RAILROAD GRANT—FORFEITURE OF CHARTER.

CHRISTIENSEN ET AL. *v.* HASTINGS AND DAKOTA RY. CO.

The fact that a railroad is not constructed within the period fixed by the granting act, or that the charter of the company is declared forfeited by judicial decree, does not authorize the Department to disregard the grant, and withhold title to lands which, under the terms of the grant were subject thereto, and became the property of said company prior to the forfeiture of its charter.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

I have considered the appeals forwarded with your letters of July 21, and August 3, 1892, from your decision of November 24, 1891, sustaining the action of the local officers in rejecting the applications, specifically described in your letters, for conflict with the grant under the act of July 4, 1866 (14 Stat., 87), to aid in the construction of a railroad from Hastings, Minnesota, to the western boundary of the State, which grant was, by the State, conferred upon the Hastings and Dakota Railway Company.

The lands herein involved are within the primary, or granted, limits of the grant for the Hastings and Dakota Railway Company, the rights of which attached in said limit June 26, 1867. They are also within the indemnity limits of the grant for the St. Paul, Minneapolis and Manitoba Railway Company (main line), and were selected on account of said grant.

In the case between said companies, involving their respective rights in conflicting limits, it was held, as to the lands in class "A," which are similar to those in question—viz: those within the primary limits of the Hastings and Dakota Railway Company's grant, and also within the indemnity limits of the Manitoba Company's grant—that all lands free from claim at the date of the attachment of rights under the grant for the Hastings and Dakota Railway Company passed to that company. (13 L. D., 440.)

Upon the promulgation of this decision you, in letter of November 12, 1891, addressed to the local officers, canceled the indemnity selections theretofore made by the Manitoba Company of these lands.

The numerous applications to file for or enter the lands in question were rejected by the local officers for conflict with the rights of the railroad companies under both grants, but, having canceled the selections by the Manitoba Railway Company, your decision, appealed from, sustains the rejection for conflict with the grant for the Hastings and Dakota Railway Company.

There is nothing in the record before me to show, either by allegation or proof, that any of the lands in question were reserved, occupied, or claimed adversely to the company at the date of the attachment of rights under its grant. The road was, however, built out of time, and having sold, or leased, the road bed and rolling stock, the charter granted the Hastings and Dakota Railway Company was, in 1886, by the State courts, forfeited for non-user, and it appears from subsequent proceedings that Russell Sage has been appointed trustee for the stockholders to take charge of the estates and effects of said company. (36 Minn., 246-270; see also Ex. Doc. No. 188, 52d Congress, 2d session.)

No action has been taken by Congress forfeiting this grant, so the sole question for consideration is: Does the fact that the road was built out of time, and that its charter has been forfeited authorize this Department to disregard the grant and make other disposition of the lands?

It is first necessary to inquire what title the company had in these lands prior to the forfeiture of its charter; for, if its title was then complete, the lands became part of its assets, and would follow the disposition of its other properties.

In the case of the Wisconsin Railroad Company v. Price county (133 U. S., 496), the question before the court was, as to whether certain parcels of lands within its granted and indemnity limits were subject to taxation. As to the granted lands the court held:

The road having been built as early as June, 1877, and supplied, as required, with the appurtenances specified, the company was entitled to have the restrictions upon the use of the land released. It had then, to the eleven forty-acre parcels which were capable of identification, an indefeasible right or title; it matters not which term be used. The subsequent issue of the patents by the United States was not essential to the right of the company to those parcels, although in many respects

they would have been of great service to it. They would have served to identify the lands as coterminous with the road completed; they would have been evidence that the grantee had complied with the conditions of the grant, and to that extent that the grant was relieved of possibility of forfeiture for breach of them; they would have obviated the necessity of any other evidence of the grantee's right to the lands; and they would have been evidence that the lands were subject to the disposal of the railroad company with the consent of the government. They would have been in these respects deeds of further assurance of the patentee's title, and, therefore, a source of quiet and peace to it in its possessions. . . . We are of opinion, therefore, that these eleven forty-acre parcels were in 1883 subject to taxation by the State of Wisconsin. The lands had become the property of the railroad company, and there was nothing to hinder their use and enjoyment. For that purpose it is immaterial whether it be held that the company then had a legal and indefeasible title to the lands, or merely an equitable title to them to be subsequently perfected by patents from the government.

By the terms of the acts making the grant for the Wisconsin Central Railroad Company, that road was required to be built by December 31, 1876, so it will be seen that the land involved in the case then before the court was opposite the portion of that road which was built out of time. See also *St. Paul and Pacific R. R. Co. v. Northern Pacific R. R. Co.* (139 U. S., 1), and cases therein cited. In that case it was held:

The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one in *praesenti*; that is to say, it is of that character as to all lands within the terms of the grant, and not reserved from it at the time of the definite location of the route.

The Hastings and Dakota Railway Company completed that part of its road extending from Hastings to Glencoe, seventy-four miles, within the statutory period, and the remainder, 128.1 miles, after the expiration of that period.

As it appears that the lands in question are of the character granted by the act of 1866, to aid in the construction of the road since known as the Hastings and Dakota Railway, being within the limits and not covered by the excepting clause, I must, following the above decisions of the court, hold that these lands were, prior to the proceedings under which its charter was forfeited, the property of the Hastings and Dakota Railway Company, and that the sole duty of this Department in the premises, having found them to be of the character granted, is to certify them on account of the grant. The rejection of the applications in question is therefore sustained.

It appears, however, from your report of August 3, 1892, that, with the exception of three tracts, all the lands embraced in said applications were, by you, inadvertently included in a list submitted for the approval of this Department, which list was approved on April 8, 1892, on account of this grant. In explanation of such oversight, it is stated:

The clerk in charge of the appeal desk in the railroad division of this office, having jurisdiction over these appeals, became seriously ill early in March, and has not

been on duty since, and as a result the appeals were not noted upon the tract books relating to the lands involved, so that in the preparation of a list of lands for certification on account of the Hastings and Dakota Railway grant (which work was performed pursuant to departmental instruction that said grant should be adjusted without delay), the clerks engaged in the performance of that duty had no notice of the pendency of said appeals.

In the present case no harm has resulted from such oversight, as the rejection of the applications was proper, but care should be taken to avoid such errors in the future, by making proper detail where clerks having charge of such matters are for any reason absent.

SOLDIERS' ADDITIONAL HOMESTEAD—CONFIRMATION.

V. T. MOSHIER ET AL.

The confirmatory provisions of section 7, act of March 3, 1891, extend to a soldier's additional homestead entry, made on a certificate of right based upon alleged service in the Missouri Home Guards, though the records of the War Department fail to show such service.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

I have considered the appeal of J. B. Haggin, transferee, from your decisions of April 20, and June 19, 1891, holding for cancellation soldiers' additional homestead entry, made in the name of V. T. Moshier, April 10, 1882, for the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 10, T. 11 N., R. 27 W., San Francisco, California.

A certificate, showing an additional right of entry for eighty acres, was issued to V. T. Moshier, July 17, 1878, upon which the entry above described was allowed.

By your letter of May 21, 1885, said entry was held for cancellation for illegality, it being based upon alleged service in the Missouri Home Guards.

An appeal was taken, and, on August 17, 1886, the case was returned to you for consideration, in connection with the act of May 15, 1886 (24 Stat., 23).

No further action appears to have been taken upon the case, until on December 10, 1890, call was made upon the War Department for an official statement of the service of Moshier, who alleged service in Company "A," Gasconade, Co., Missouri Home Guards Regiment.

The following day, report was made "that the name of V. T. Moshier has not been found on rolls of Company 'A,' Gasconade Co., Missouri Home Guards, as shown by books Hawkins Taylor commission."

On April 20, 1891, you again held the additional entry for cancellation for illegality, but, as it appeared to be possible that Moshier might have served in some other organization than the Missouri Home

Guards, you allowed sixty days from notice within which to furnish proper evidence of his military service.

April 28, 1891, Britton and Gray, attorneys for Haggin, filed with you a motion for reconsideration of your decision of April 20, asking that under section 7 of the act of March 3, 1891 (26 Stat., 1095), patent be issued. They claimed that it was unnecessary to call for additional evidence; that the entry was made April 10, 1882; that April 20, 1882, J. B. Haggin purchased the land for a valuable consideration; that on November 13, 1882, they filed Haggin's affidavit, setting up these facts, and filed with you a copy of said affidavit; that the purchase was made in good faith, relying upon the certificate of your office; that the entry was made under the homestead law, and certificate issued thereon; that there are no adverse claims initiated prior to final entry, or at any time; that the land was sold prior to March 1, 1888, and "after final proof," to a *bona fide* purchaser for a valuable consideration.

On the 19th day of June, 1891, you passed upon the motion for reconsideration and denied the same. Haggin appeals from your decisions of April 20, and June 19, 1891, and assigns error as follows:

First: In holding that said entry was illegal in its inception.

Second: In not applying to the case the beneficial provisions of the act of June 15, 1880, and,

Third: In holding that the entry is not fully covered by the provisions of the seventh section of the act of March 3, 1891, stated above.

In the case of *United States v. Samuel C. Coonsy* (14 L. D., 457), it was held that the confirmatory operation of section 7 of the act of March 3, 1891 (*supra*), extends to soldiers' additional homestead entries, based on service in the Missouri Home Guards. The only difference between that case and the one now under consideration is that in the present case the report from the War Department does not show the service as alleged, according to the returns of the Hawkins Taylor commission.

I find, upon examination of the papers, that the affidavit, on which the certificate of the right to additional entry issued, alleges that the entryman enlisted under the name of V. T. *Moshur*, and had the call been made in that name, a different report might have been received. However this may be, I am of the opinion that this report does not affect the question now under consideration, viz: the effect of the confirmatory provision incorporated in the body of section 7 of the act of March 3, 1891.

It has been held that service in the Missouri Home Guards does not entitle the party to the benefits of sections 2304 and 2306 of the Revised Statutes, authorizing soldiers' additional homestead entries, but, in the case of *United States v. Coonsy* (*supra*), the confirmatory operation of this section was held to extend to such entries in the hands of a *bona fide* transferee under a purchase made prior to March 1, 1888.

If service in the Missouri Home Guards by one borne upon the records as shown in the War Department will not support an additional entry, wherein is the difference, so far as the confirmatory operation of the act

is concerned, whether the present entryman was borne upon the rolls as prepared or not.

The purchaser in this case, in all probability acting upon the strength of the certificate issued by your office showing the party entitled to an additional entry of eighty acres is presumably in as good faith as he who purchased from Coonsy.

I am therefore of the opinion that the entry is confirmed, if, after due notice, the transferee satisfactorily shows compliance with the circular of May 8, 1891 (12 L. D., 450).

Your decision is reversed; and the record is herewith returned, for the adjudication of the rights of the transferee under the circular referred to.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

SETHMAN v. CLISE.

The right of purchase under section 5, act of March 3, 1887, accorded to *bona fide* purchasers of the land, who have the requisite qualifications in the matter of citizenship, is not dependent upon the qualifications of the immediate grantee of the company.

The right of a qualified transferee to purchase under said section is not affected by the fact that his purchase was made after the passage of said act, if the land was originally purchased in good faith from the company.

A claim resting upon an application to enter is not protected under either of the provisos to said section, as the terms thereof provide only for the protection of settlement rights.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

The N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of section 5, T. 3 S., R. 68 W., Denver, Colorado, is within the primary or granted limits of the grant of July 1, 1862 (12 Stats., 489), and July 2, 1864 (13 Stats., 356), to the Union Pacific, formerly the Denver Pacific Railway Company, the right of which attached to lands in this vicinity August 20, 1869.

On June 27, 1866, Alexander F. Safely filed pre-emption declaratory statement No. 2292, for the tract in question, alleging settlement thereon the same day.

On November 6, 1873, the railroad company having submitted certain affidavits to the effect that Safely had abandoned his claim, you awarded the tract to the company, stating substantially that the records of your office showed that the filing of Safely had expired by limitation.

On March 15, 1884, the company sold the tract for \$1,099.98 to Genordo Lasasso and Sabbato Sungaria. The purchasers took possession of the tract in the fall of 1884, built a house thereon and settled upon the land, placing some \$2,000 worth of improvements thereon,

and they and their grantees have maintained possession and resided upon the tract continuously since said first settlement.

On June 15, 1885, Harry R. Clise made an application to enter said tract as a homestead, which was rejected the same day for the reason that the tract was railroad land. He appealed from this order of rejection to you.

On March 10, 1886, William A. Cates made a timber culture application for said tract, which was rejected the same day for the same reason assigned for the rejection of Clise's homestead application. He also appealed from said order of rejection to you.

On May 24, 1886, Genordo Lasasso, one of the purchasers from the railroad company, filed a protest against the allowance of the applications of Clise and Cates, and at the same time made a homestead application for the tract, which was rejected on the same day for the same reason assigned as a cause for the rejection of the applications of Clise and Cates. He appealed from the order of rejection to you.

On June 19, 1886, you held the tract in question to have been excepted from the grant to the railroad company by reason of the filing of *Safely*, which action was affirmed by this Department on December 8, 1888. (*Harry R. Clise v. Union Pacific Railway Company*, Press Copy Book No. 167, p. 315.)

On April 19, 1887, the grantees of the railroad company assigned and transferred their claims to the tract under their contract of purchase with the company to Peter H. Sethman, and on August 27, 1888, said company executed a deed conveying the tract to Sethman.

On January 2, 1889, you ordered a hearing to determine which of the applicants, Clise, Cates, or Lasasso, was entitled to enter the land. The trial was set for February 26, 1889, and was attended by Clise and Lasasso. The former submitted, in support of his right to make entry, his homestead application, and rested his case. Lasasso refused to offer any evidence, but moved to dismiss the hearing.

On January 30, 1890, Sethman filed notice of his intention to make proof on March 5, 1890, of his rights to make entry and purchase the land under the provisions of the 5th section of the act of March 3, 1887 (24 Stat., 556).

On March 5, 1890, said proof was submitted, and on March 20, 1890, the register and receiver held that the final proof of Sethman could not be considered, or any further action taken therein, until the applications pending before your office should be disposed of. They accordingly dismissed his proof. From their action he appealed to you.

On March 26, 1890, Lasasso filed in the local land office a motion and application praying that his appeal of March 12, 1886, from the rejection of his application to make homestead of said tract be dismissed, and on April 28th, following, you dismissed said appeal. Lasasso therefore ceased to have any interest in the case, and Cates, having defaulted at the hearing ordered to determine the respective rights of the applicants for the land, has abandoned whatever interest he may have had in the

tract by reason of his application for entry. Thus it is seen that all parties claiming any rights in the land in question have dropped out of the controversy, except Clise, who claims by reason of his homestead application filed in 1885, and Sethman, who claims as grantee under the purchase of Lasasso and others from the railroad company in 1884, to be entitled to purchase the tract from the government under the 5th section of the adjustment act, *supra*.

On October 7, 1890, you considered the rights of these two parties, and held the claim of Clise to be paramount. You accordingly affirmed the action of the local land officers in refusing to consider the proof made by Sethman.

He has appealed from your judgment to this Department.

The section under which he claims the right to purchase from the government is as follows:

SEC. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as afore-said shall be entitled to prove up and enter as in other like cases.

The circular of instructions of November 22, 1887, (6 L. D. 276), issued under the act in question, speaking of the rights of purchasers under the 5th section thereof, provides that,—

Under this section, when the company has sold to citizens of the United States, or persons who have declared their intention to become such citizens, the numbered sections prescribed in the grant, and coterminous with the constructed portions of the road, within either the granted or indemnity limits, and which upon the adjustment of the grant are shown to be excepted from the operation of the grant, it shall be lawful for such purchasers—if their purchase is bona fide—to purchase said land from the government, by payment of the government price for like lands, unless said lands were at the date of purchase in the bona fide occupation of adverse claimants under the pre-emption or homestead laws, in which case the pre-emptor or homestead claimant may be permitted to perfect his proof, unless he has since voluntarily abandoned the land.

Under the last proviso of said section, however, if a settlement was made on said lands subsequent to December 1, 1882, by persons claiming the same under the settlement laws of the United States, it will defeat the right of the purchaser whether said purchase was made prior to or subsequent to December 1, 1882, and the settler will be allowed to prove up for said lands as in other like cases.

And the general circular under the act in question, dated February 13, 1889 (8 L. D., 348), provides the manner of procedure under the section in question. It provides among other things at page 352, that the proof on the part of the applicant to purchase, must show,—

1. That the tract was of the numbered sections prescribed by the grant.
2. That it was coterminous with constructed parts of said road.
3. That it was sold by the company to the applicant, or one under whom he claims, as a part of its grant.
4. That it was excepted from the operation of the grant.
5. That at the date of said sale it was not in the *bona fide* occupancy of adverse claimants under the pre-emption or homestead laws, whose claims and occupancy have not since been voluntarily abandoned.
6. That it has not been settled upon subsequent to the first day of December, 1882, by any person or persons claiming the right to enter the same under the settlement laws.
7. That the applicant is, or has declared his intention to become, a citizen of the United States.
8. And that he, or one under whom he claims, was a *bona fide* purchaser of the land from the company.

The circular of instructions under the 5th section of the act in question, dated August 30, 1890 (11 L. D., 229), holds on page 230 thereof, that—

It can make no difference, in my judgment, whether the applicant is the immediate purchaser from the company, or a purchaser one or more degrees removed. If he is a *bona fide* purchaser of the land, and has the required qualification as to citizenship, he is within the intentment of the statute, and if he be not the original purchaser from the company it is immaterial what the qualifications of his immediate grantor, or the intervening purchasers may have been. If his immediate grantor was a foreigner, and his purchase was simply for the purpose of acquiring title from the government for the benefit of the foreigner, he would not be a *bona fide* purchaser, and would not therefore come within the terms of the act.

It was not in any sense, the intention of Congress to confirm sales made by the company, but rather to afford to citizens, or persons having declared their intention to become such, who were *bona fide* purchasers of lands to which the company had not title, a means of acquiring title from the government, to the exclusion of settlers or purchasers under the general land laws.

It was determined by the Department December 8, 1888, that the filing of Safely excepted the tract in question from the operation of the grant to the railroad company. The application of Clise to make a homestead entry was filed on June 15, 1885. Lasasso had been living on the land at that time for almost a year, and had placed thereon improvements worth two thousand dollars. The grantors of Sethman bought the tract from the railroad company on March 15, 1884, and they and their grantees have had possession thereof ever since.

There can be no question but that the tract was sold by the railroad company in 1884, under the belief, both of the seller and buyer, that it was railroad land; at that time no one was asserting any claim to it adverse to the railroad company. The question has been raised in this case as to whether or not the first purchasers from the company in 1884 were citizens of the United States, or whether at that time

they had declared their intention to become citizens. Sufficient evidence is not before me from which I can determine whether they were citizens or not, or whether their intentions on that subject had been declared. As seen heretofore, their qualifications are not important if the purchasers from them are qualified. There is no abstract with the record showing the transfers of the tract, or the assignments of the contract of purchase.

It is asserted by counsel for Sethman in their brief, that

After several assignments of the original contract with the railroad company, it was, on April 19, 1887, by its then owners, assigned to Peter H. Sethman, who fully paid for the land and completed the contract, and the company, by deed dated April 19, 1888, and acknowledged August 27, 1888, finally conveyed the tract to him.

The question arises as to whether Sethman, having purchased the tract after the passage of the act of March 3, 1887, will be allowed by the terms of the fifth section thereof to purchase the land from the government? Said act directs the immediate adjustment of railroad grants, and the fifth section, it seems, was intended to afford a means by which certain purchasers from the roads, who should, by reason of said purchases, have acquired equities in the lands claimed by them, the privilege of saving their interests by giving them preferred rights to purchase said tracts from the government, and to save their interests more completely from loss it was provided by the fourth section of the act that they might recover from the railroad companies the purchase price thereof. The prime object of the act was to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and to recover lands erroneously patented to said companies. Congress contemplated the immediate adjustment of these grants, and while willing to afford means for recovering from said companies lands to which they were not actually entitled, or lands not earned by them, but claimed by them under their respective grants, it was unwilling to destroy the equities of said companies' grantees, or those whose title was held through them; hence the fifth section sought to protect such transferees.

Attorney General Garland gave an opinion on certain questions proposed to him on the third, fourth and fifth sections of this act on November 17, 1887 (6 L. D., 272), speaking of the act, on page 275 he says,—

The whole scope of the law from the second to the sixth section, inclusive, is remedial. Its intent is to relieve from loss settlers and bona fide purchasers, who, through the erroneous or wrongful disposition of the lands in the grants, by the officers of the government, or by the railroads, have lost their rights or acquired equities, which in justice should be recognized . . . The whole remedial part of the law was passed with a recognition of the fact that the railroad companies had sold lands to which they had no just claims.

In my opinion it was the intention of Congress that the adjustment of these grants should be begun at once and completed as soon as possible, yet experience has shown that making these adjustments was not the work of a day and Congress must be held to have known that much time was necessarily employed before the end should be reached.

The act directed the manner of making adjustments, and it was the evident intention of Congress, as expressed in the 5th section of the act, that when in the adjustment of these grants it was ascertained that land had been bought from the railroad companies for which they could convey no good title, such buyers or their transferees, if *bona fide*, should be allowed to purchase the tracts claimed by them. And it can make no difference, I think, whether a transferee, otherwise entitled to purchase, bought the land before or after the day of the approval of the act, if it was originally purchased in good faith from any said company.

Sethman has declared his intention to become a citizen of the United States. He should be allowed to purchase the tract in question, unless it was excepted from the provisions of said section five by being at the date of the sale, March 15, 1884, in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws of the United States, whose claims and occupation have not since been voluntarily abandoned, or that the tract was settled upon subsequent to the first day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States. In this case no settlement has ever been made on this tract, except by those claiming under and through the railroad grant. Clise does not even allege settlement, but rests on the rights secured by his application to enter. While settlement, as between him and the government, would not be required prior to the allowance of his entry, still to entitle him to the benefits of either of the provisos of section 5, he must have made a settlement. Only actual settlers are protected under the second proviso to said section.

On March 15, 1884, the date of the sale by the railroad company of this tract, it had not been settled upon or claimed by any body.

I am of the opinion that the application of Clise to enter this tract under the homestead laws should be denied, and that Sethman should be allowed to purchase the same under the provisions of the fifth section of the act in question, if his proof now on file, upon consideration by you, is found sufficient under the instructions heretofore given in such cases, (Samuel L. Campbell, 8 L. D., 27), and if found insufficient additional or new proof should be called for. You will accordingly deny the application of Clise, and consider the application and proof of Sethman to purchase said tract.

Your judgment is accordingly reversed.

RAILROAD GRANT-INDEMNITY SELECTIONS.

ATLANTIC AND PACIFIC R. R. CO. (ON REVIEW).

Indemnity selections should not be rejected on the ground that they are not "nearest to the lost lands," if they are in fact the nearest available surveyed lands subject to indemnity selection at that time.

On submission of indemnity selections the losses should be specified with particularity, and correspond with the selections, tract for tract, in no case exceeding a section.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

With your letter of May 1, 1889, was transmitted a motion filed by the Atlantic and Pacific Railroad Company, for the review of departmental decision of March 29, 1889 (8 L. D., 373), sustaining your action in rejecting a certain list of indemnity selections in the Prescott land district, Arizona, for the reason that the lands selected "are not nearest to the lost lands, as required by departmental instructions" (see Circular, 4 L. D., 90).

The motion alleges that "the lands selected are the nearest available surveyed lands from those so lost in place."

Upon examination, I find that the losses assigned as the basis for this list of selections are lands in the primary limits of the grant embraced in the Moqui Indian Reservation.

Said reservation is located to the north of the road, and, an examination of the land office map of 1887, the time of the selection, shows that the lands in the indemnity belt to the north of the road, and in the vicinity of said reservation, were then unsurveyed.

The lands selected in said list, aggregating 163,381.62 acres, are to the south of the road, but appear to have been the nearest available surveyed lands subject to indemnity selection at that time.

I must therefore hold that it was error to reject the selection for the reason assigned. I note, however, that the losses are given in bulk, i. e., lands are assigned as lost in said Indian reservation in certain named townships, being all of the reservation within the primary limits, and not tract for tract as required.

(See instructions given in the matter of the adjustment of the grants for the St. Paul, Minneapolis and Manitoba Railway Company and the St. Paul and Northern Pacific Railroad Company, 13 L. D., 353.)

It was not the practice at the time these selections were made to insist upon this particularity in the matter of the selection of indemnity lands, although the requirements of the law seem to be plain in this particular, the statute providing: "and whenever, prior to said time, any of said sections or parts of sections shall have been granted . . . other lands shall be selected by said company in lieu thereof . . . in alternate sections," &c.

The grant is of sections and parts of sections, and the losses must be shown as the grant is made, i. e., by showing as a basis for the indemnity selections corresponding losses, in no case exceeding a section.

The attention of the company should therefore be called to this matter, to the end that the losses may be specified with particularity and correspond with the selections, tract for tract, in no case exceeding a section.

Upon the filing of a proper list, within a reasonable time after notice, the same will be accepted, unless other sufficient reason, not shown in the record before me, warrants its rejection. The previous decision of this Department in the matter is to this extent modified.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

UNION PACIFIC RY. CO. *v.* NORTON.

The right of purchase under section 5, act of March 3, 1887, is not defeated under the first proviso to said section, if, at the date of the sale by the railroad company, the land was not in the *bona fide* occupation of adverse claimants under the pre-emption or homestead laws, nor under the second proviso by an application to enter under the homestead law on behalf of one who does not allege a settlement right.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

The SW. $\frac{1}{4}$ of Sec. 3, T. 4 S., R. 69 W., Denver, Colorado, is within the limits of the grant to the Denver Pacific Telegraphic and Railway Company, now the Union Pacific Railway Company, the right of which attached to lands in the vicinity of this tract, on definite location of the road August 20, 1869.

The record shows that Richard K. Cline filed a pre-emption declaratory statement for the tract in question March 23, 1865, alleging settlement the day before.

Robert Henderson made a like filing on the land March 28, following, alleging settlement the same day, and on October 30, 1866, David O. Searth made similar filing thereon alleging settlement the same day.

On February 17, 1872, William Neal filed a pre-emption declaratory statement for the tract, alleging settlement the day before, and on January 6, 1875, you canceled his filing for conflict with the railroad grant.

On July 21, 1874, the railway company sold and transferred the tract to Horace A. Gray and Peter G. Bradstreet. Afterwards Gray conveyed his interest to Margaret P. Evans, and in 1883 said Bradstreet and Evans sold and conveyed the same to John S. Stanger, who soon thereafter enclosed the land with a fence and cultivated a part thereof.

On June 12, 1885, Michael F. Norton applied to make a homestead entry for the land. His application was rejected on account of the rail-

road claim, and he appealed. On March, 15, 1886, the railway company moved that Norton's application be dismissed.

April 26, 1889, Bradstreet and Evans, through their attorney in fact, applied to purchase the tract from the government under the act of March 3, 1837 (24 Stat., 556). Their proposed purchase was to make good the title of the transferee.

December 18, 1889, Stanger, the transferee of Bradstreet and Evans applied to purchase the land under the act of August 13, 1888 (25 Stat., 439).

Bradstreet and Evans offered proof on their application after publishing notice of the time and place thereof.

June 18, 1891, you considered the claims asserted for the tract, and held that the pre-emption filings excepted the land from the operation of the railway grant, rejected the applications to purchase, and allowed Norton's homestead entry. The case is here on the appeal of said company and the transferee.

July 6, 1891, after your decision was made, Stanger applied to purchase the tract under the fifth section of the act of March 3, 1837, which was forwarded to the Department unacted upon by you. It would appear from this that he has abandoned his application under said act of August 13, 1888, but whether he has or not, it must be denied, because that act applies only to lands that have "heretofore been withdrawn by the executive department," and the land in question has never been withdrawn, because never subject to withdrawal, being excepted from the grant by preemption filings.

The question to be determined is—Has Stanger or his grantors the right to purchase the land under the provisions of the fifth section of the act of March 3, 1837, (*supra*). That section reads as follows:

That where said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at ordinary government price for like lands, and thereupon patents shall issue therefor to said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided, further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same, under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

The right of purchase under this section undoubtedly exists unless the tract falls within either the first or second exception contained

therein. Said right is not prevented by the first proviso, because at the date of the sale by the railroad company the tract was not "in the bone fide occupation of adverse claimants under the pre-emption or homestead laws of the United States." The tract was sold by the railroad company in 1874, and Norton did not seek the right to enter it until 1885.

Under the second proviso it is said that a tract may not be purchased under the body of said section where the lands have been "settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws," etc. Norton is not a settler on this land, and does not claim any settlement, but relies solely upon his application to make a homestead entry, made July 12, 1885.

I am of the opinion that this provision was intended to defeat the right of purchase only where necessary to protect the right of an actual settler. (*Union Pac. Ry. Co. v. McKinley*, 14 L. D., 237). It would require a liberal construction of said section to save the claims of those who are only applicants for the public lands. In my opinion the body must be construed liberally so as to afford the relief intended, but the provisos should be strictly construed.

The tract in this case was purchased from the railway company in good faith in 1874, and all subsequent purchases have been made in like manner for valuable considerations.

You have found that the present claimant and his grantors are citizens of the United States, and since the tract has not been settled upon "subsequent to December 1, 1882," and before the passage of the act, the right of purchase should be given under the act in question.

The application of Bradstreet and Evans, made, as it seems to cure the title of their grantee, and save themselves from loss, as well as protect their security for the unpaid balance of purchase money, should be allowed upon proof furnished as specified in the case of *Samuel L. Campbell* (8 L. D., 27).

The application of Stanger himself to purchase has not been acted upon, and since the allowance of that made by his grantors would make good his title, it would seem to be unnecessary.

Your judgment is reversed except in so far as it denied the claim of title made by the railway company. The application of Norton is rejected, and you are directed to allow the application to purchase made by Bradstreet and Evans.

RESERVATION—CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

UNITED STATES *v.* BULLEN (ON REVIEW).

An executive order creating a reservation is inoperative as to land embraced within a pre-emption entry on which final certificate has issued.

The confirmation of an entry under the body of section 7, act of March 3, 1891, is not defeated by a claim based on the alleged prior occupancy of the land by a non-reservation Indian, where at the date of said entry there was no authority for such occupancy.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

On February 1, 1893, this Department, in a decision by First Assistant Secretary Chandler, confirmed under section 7 of the act of March 3, 1891 (26 Stat., 1095), the pre-emption cash entry of Joseph A. Bullen, for lots 1 and 2, Sec. 28, and lot 1, Sec. 27 (erroneously described in said decision as Sec. 29), T. 49 N., R. 13 W., Willow River, now Ashland land district, in the State of Wisconsin (see 16 L. D., 78).

The Secretary of War has asked for a reconsideration of the same, upon the ground that some of said land is now and for a long time prior hereto has been occupied by the United States government for military and commercial purposes, and large sums of money expended thereon for such purposes.

The entry of Bullen was made February 9, 1854, and, on the 18th of the same month, he sold the land to George L. Becker.

By executive order of March 13, 1854, these two sections were reserved for military purposes.

May 11th of the same year, your office suspended Bullen's entry for further proof as to his improvements on the various subdivisions of the land entered.

December 19th of the same year Becker sold the land to William W. Corcoran and others.

January 18, 1865, Sec. 27 was released from reservation. No further action was taken until August 17, 1875, when

your office examining the entry held that as, at the date of the executive order (of reservation), Bullen had completed his entry, the land entered was not subject to the order of reservation, and finding substantial compliance with the law on the part of the entryman, adjudged him entitled to the patent.

From this decision the Secretary of War appealed, and, on August 23, 1878, this Department decided that the assignees should be required to furnish further evidence of the entryman's compliance with law and of the good faith of the assignees.

No response was made to this requirement, and, on August 6, 1884, John A. Bardon applied to make homestead entry of the land. His application was refused, because of Bullen's entry. He appealed, and, on December 18, 1885, this Department affirmed the action of the local office and your office in rejecting his application.

February 6, 1886, your office directed the local officers to notify the present owners of the land of the defects in the proof, and to require them, within sixty days of notice, to furnish the requisite evidence of compliance with law on the part of the entryman.

August 28th of the same year, the local officers transmitted several affidavits, tending to show that Bullen had complied with the law in all respects.

November 16, 1887, Bardon applied to contest Bullen's entry on various grounds. Frank W. Gage also applied for the same purpose, his application antedating that of Bardon about one month.

These two applications were forwarded to your office, and on March 2, 1889, this Department, in the case of Joseph A. Bullen (8 L. D. 301), held that:

The government itself is the contestant, and that, as may well be surmised from this history, the pre-emption claimant and the alleged innocent purchaser, neither ever in fact, held any possession of the land; that from the great length of time that has passed, the land has undoubtedly increased very much in value, which may account for the strife between these parties to secure the position of a contestant. If these facts should appear, to allow either of them now to contest the entry, with the rights of an original contestant, would be to award him great advantages not resulting from his action. The Secretary of War was the real contestant, who has prevented the consummation of the entry, and, before this land should be thrown open to purchase under the land laws of the United States, the contest inaugurated by the Secretary of War in the interest of the government should be prosecuted to a completion, and full information in respect to the situation and character of the land obtained, upon which your office may act intelligently for the interests of the public. I have, therefore, to direct that no application to contest be now admitted, but that you cause a special agent of the government to make thorough inquiry and examination into all the facts and take such steps to protect the public interests, as appear to be requisite and proper. The special agent should be directed to make full report to your office, in regard to the present value of the land, its situation and circumstances, and all material facts.

In pursuance of the above directions, Special Agent Maull, on May 16, 1891, reported that said land had been sold in town lots to about four hundred purchasers, and that he was unable to discover any evidence of fraud upon the part of the entryman, or that he did not make the entry in good faith. His report was accompanied with many affidavits and unverified statements, pro and con, some alleging compliance with law on the part of the entryman, and others denying it. He also reported that a half-breed Chippewa Indian, one Peter Lemieux, had been living upon the land for thirty-two years, that the house of Bullen had rotted down, "but shows there was one years ago."

The record also shows that said Indian, on January 10, 1891, presented an Indian allotment application, under the act of February 8, 1887 (24 Stat., 388), for lots 1 and 2 of said tract.

The above are the material portions of the record before this Department on February 1, 1893, date of the decision now sought to be reviewed.

Bardon and Lemieux have also filed motions for review of said decision.

The fact that the government is in the use and occupation of a portion of this land affords no ground for disturbing the entry. When Bullen made his final proof, paid for the land, and received his final certificate, the land was unreserved and open to settlement, and the executive had no authority subsequent thereto to reserve it for any purpose.

The contestants Bardon and Gage are not entitled to consideration, because at the date of their several applications to contest, the entry was under investigation by the government, and it was correctly decided, in the case of Joseph A. Bullen, *supra*, that no application to contest could be admitted.

The claim of the half-breed Lemieux is also without merit, because at the date of Bullen's entry there was no law or regulation in force allowing non-reservation Indians to occupy or lay claim to public lands outside of their respective reservations, and any such occupancy by a member of any tribe of Indians was but a trespass upon the public domain. It was not until March 3, 1875, that any rights were conceded to Indians claiming or improving public lands apart from that embraced in their respective reservations. On that date Congress, in the deficiency appropriation act for the year ending June 30, 1875, provided that under certain restrictions and limitations, Indians who were born in the United States, and were twenty-one years of age or the heads of families, and had abandoned or might hereafter abandon their tribal relations, could, under the direction of the Secretary of the Interior, avail themselves of the homestead laws. (18 Stat., page 420, Sec. 15.)

A similar statute was enacted July 4, 1884, under the terms of which the United States was to hold the land so patented, in trust for the Indian entryman, for a period of twenty-five years from issue of patent. Some other provisions have since been made to aid Indians in securing homesteads, etc.

The act of February 3, 1887 (24 Stat., 388), under which Lemieux claims, authorized non-reservation Indians to make allotments on lands of the United States *not otherwise appropriated*. (See Sec. 4.)

The land in dispute was appropriated by Bullen's entry more than thirty years prior to the passage of this act, and, as we have seen, as the date of its appropriation by Bullen, there was no law or regulation protecting Lemieux in his occupancy. If, then, this entry is to be disturbed, it must be on the claim of the government, and it must be shown, not only that the entry was fraudulently made, but that the purchasers were parties to or had knowledge of such fraud, because the land was sold prior to March 1, 1888, and the entry must be confirmed under the 7th section of the act of March 3, 1891 (26 Stat., 1095), unless fraud has been found on the part of the purchasers, etc.

The instructions of May 8, 1891, under said act (12 L.D., 450), provide that:

Under this clause where it is satisfactorily shown that a sale or encumbrance was made prior to March 1, 1888, such sale or encumbrance will be presumed to have been made in good faith, and unless such presumption be overcome by facts presented by the record or in connection with the sale, such entry should pass to patent. Any facts appearing in the record, which indicate bad faith on the part of the purchaser or encumbrancer or collusion between him and the entryman, should justify an investigation by the proper agents of the government, and this statute will not be construed as prohibiting such investigation for the purpose of determining as to the good faith of the purchaser or encumbrancer.

Are there any facts in this record that will "justify an investigation," etc.

When this case was here before, Secretary Vilas directed that a special agent should "make thorough inquiry and examination into all the facts, and take such steps to protect the public interests as appear to be requisite and proper." That agent has reported that he is unable to discover any fraud upon the part of the entryman or purchasers, and that the land is worth above a hundred thousand dollars, that it has been cut up into town lots, and is now owned by about four hundred different purchasers.

A generation has passed since he made his final proof, which shows a compliance with law, and to cancel it now, the government must rely upon the testimony of witnesses, derived from their recollection of events that occurred nearly forty years ago. When it is remembered that the titles of four hundred owners of property would depend upon the memory of witnesses reaching back over so many years, the wisdom of such investigation must be seriously doubted. An examination of the evidence submitted with the report of the investigation already had clearly demonstrates the danger of relying upon such testimony. It is all contradictory; no two witnesses agreeing as to facts represented as coming within their personal observation. It seems to me that it would be almost impossible for the government to establish, satisfactorily, any affirmative fact after so long a lapse of time. The propriety of disrupting the title to property of more than a hundred thousand dollars in value, in the hands of four hundred different claimants, upon testimony as uncertain and unreliable as this must necessarily be, is more than doubtful.

That portion of the land occupied and required by the government may be obtained through the exercise of the right of eminent domain, at a trifling cost, probably not much in excess of the expense of another investigation.

The several motions for review are denied.

PROCEEDINGS BY THE GOVERNMENT—EVIDENCE.

UNITED STATES *v.* LOPEZ.

In proceedings by the government an application of the entryman to have the testimony taken under Rule 35 of Practice should not be denied, where it is evident that injustice and great hardship will result from such denial.

An application for an order to take depositions should be allowed if made in due compliance with the rules of practice.

On a charge that a deceased entryman in his lifetime had agreed to convey to others the land in dispute hearsay testimony as to such agreement is incompetent.

First Assistant Secretary Sims to the Commissioner of the General Land Office, September 21, 1893.

The land involved in this controversy is the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 22, T. 33 S., R. 64 W., Pueblo, Colorado, land district.

It appears by the record that Antonio Lopez presented his application to enter said tract July 31, 1885, alleging settlement February 20, 1866, and the same was rejected because in "conflict with reservation for benefit of heirs of Alfred Bent, under the Vigil and St. Vrain grant." On appeal, this action was reversed, and on May 10, 1886, he was permitted to make entry. On September 3, following, he offered final proof, but it is stated the same was rejected "for the reason that it was not taken before the official designated to take said final proof." I do not find this proof in the records. Again, on November 15, following, he submitted proof. Under directions from your office, one of your special agents was present and cross examined the witnesses. This proof was also rejected by office letter of March 21, 1887, for the following reasons:

First, you admit that you do not claim as your land a large portion of the land embraced in your H. E. No. 4075, and for which you made said proof; second, you admit that the unclaimed portion—the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ of said Sec. 22—belongs to Francisco Vigil, and yet it is within the limits of your homestead. You are not aware of that fact, for you admitted that you claimed other land (and not that) as belonging to your homestead.

This is from the report of the local officers; the final proof and evidence taken before the special agent is not with the record, and the testimony in this case shows that it is lost. There is no record of any appeal from this decision of the local officers.

On the report of the special agent, you, by letter of October 17, 1887, held "so much of said entry as is embraced in the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 22, Twp. 33 south, range 64 west," for cancellation, allowing him sixty days within which to apply for a hearing. On February 11, 1888, Lopez filed his application, alleging continuous residence since 1866; that no part of the land was owned or claimed by any one else; that his entry was made in good faith for his own exclusive use and benefit, and not for the use and benefit of any other person or persons:

A hearing was accordingly ordered for May 23, 1888. On said day the receiver announced "that there were no funds in his hands on deposit available for this case." At the same time a motion was presented, asking that the case be dismissed for want of prosecution, which was overruled. A motion was then made for an order allowing the testimony to be taken at Trinidad, near the land in question. This was supported by the affidavits of Lopez' attorneys, by which it was shown that he is a poor man, in feeble health; that he resided ninety miles from the local office, and within only three miles of Trinidad; that neither the claimant or his attorneys "had any notice of the fact that there were no funds available on behalf of the government and therefore at great expense prepared for the trial this day." The register stated that he was not prepared to pass on this motion at that time, but continued the case indefinitely, and when funds were received he would notify "all parties in interest of the new date and place of hearing."

On September 20, 1888, a new notice was issued fixing the date of hearing November 10, following, to be had at the local office. Nothing seems to have been done under this notice, and the case seems to have slumbered until December 11, 1890, when notice was again issued, setting the hearing for February 12, 1891, at the local office. Subsequently the case was continued on application of the claimant until April 21, 1891.

On March 4, 1891, Juana Maria Lopez, the widow of Antonio Lopez, filed a motion, asking for an order to take the testimony before the clerk of the district court of Las Animas county, or some other qualified officer to be designated, setting forth her poverty, the distance from the land to the local office; its close proximity to Trinidad; that on account of the official and professional duties of some of her witnesses, they would be unable to attend at the local office; that she has no means to defray the expenses of her witnesses. This motion is supported by her affidavit, in which she sets out in detail her impoverished condition, and the expense it would necessarily entail on her to take her witnesses to Pueblo, giving their names and occupations. This motion was denied, because the special agent suggested it essential that the register and receiver should preside in person, and that it is impossible to have a fair and impartial hearing at Trinidad.

On April 21, the day set for the hearing, the attorney for the contestee filed a motion, accompanied by the regular affidavit and direct interrogations, asking for a continuance to May 4, in order to take the depositions of some thirteen witnesses at Trinidad. This motion was "opposed by the special agent, for the reason that all the papers in the applications for said depositions are prepared by A. W. Archibald, who is suspended from practice before this office." (The record shows that Archibald was one of the original attorneys for Lopez. His appearance was withdrawn on April 21, and on that day Mark L. Blunt

entered his appearance for contestee, and the motion for this last continuance and to take depositions is in his handwriting.)

The register overruled this motion, holding—

It is admitted that the testimony of the witnesses sought to be taken is all the testimony to be taken by the contestee in this case, and to allow this motion would be equivalent to allowing the hearing to be had at Trinidad, Colorado, a question which has already been passed upon by this office in this case.

All these rulings by the local officers were excepted to by contestee. The hearing then proceeded, and as a result the register and receiver decided in favor of the government and recommended the cancellation of the entry; and, on appeal, you, by letter of September 10, 1892, affirmed their decision. The contestee presents this appeal, alleging error as follows—

1st. In holding that the proceedings in this contest, particularly those on the part of the government, were regular and proper, and as such were a compliance with the rules of practice and amounted to due process of law.

2nd. In holding that the local officers did not abuse their discretion or violate the rules of practice in refusing to permit any testimony in said case to be taken elsewhere than before them.

3rd. In holding that the rights of the entryman or of the contestee were not invaded or injured by the action of the local officers in interfering with the conduct of the hearing.

4th. In holding that it is shown by the evidence that the entryman had entered into any contract or agreement that upon the acquisition of titles from the United States he would convey any portion of said land.

5th. In holding that the testimony referred to and relied upon as showing or establishing said agreement was competent or admissible in evidence as against the contestee.

6th. In holding that the decision of the local officers is sustained by the evidence.

7th. In sustaining the decision of the local officers and holding said entry for cancellation.

By your said letter it is decided that “there was no error on the part of the local officers in denying the motions made May 23, 1888, and March 4, 1891, that the testimony be taken at Trinidad;” that this was a matter resting in the discretion of the local officers, and unless there was gross abuse of this power, the ruling would not be disturbed. Rule 35, Rules of Practice, confers the authority for the taking of testimony other than at the local office as follows—

In the discretion of registers and receivers, testimony may be taken near the land in controversy before a United States commissioner, or other officer authorized to administer oaths, at a time and place to be fixed by them and stated in the notice of hearing.

You have correctly stated the rule to be that unless there is a gross abuse of their discretion in passing upon such a motion, their action will not be set aside, but I cannot agree with your conclusion. It seems to me that there was gross abuse of judicial discretion in the action of the local officers. The reasons for wanting the testimony taken at Trinidad are not controverted; hence they will be accepted as true. The land is ninety miles from the local office, and but three miles from

Trinidad. A pitiful plea of poverty is set up, both by Antonio Lopez in his first motion, and his widow in the second. By the former it was shown that his personal property consisted of a herd of fifty goats, which he had been forced to sell in order to prepare for the first hearing; and by the latter, the evidence shows that she is equally as poor, with a family of five helpless and dependent children. The proceedings in the local office as prescribed by law and the rules were not intended to be an engine of oppression to deprive settlers of their rights by arbitrary rulings, but are to be construed with sufficient liberality at all times with the view to aid the parties to present their claims with the least expense and trouble consistent with thoroughness. The opposition of the special agent, upon which the register acted, might be characterized as frivolous. The fear he expressed that the contestant—the United States—could not have a fair and impartial hearing at Trinidad, is without any merit. The act of the officer taking the testimony is purely clerical—I might say mechanical. The hearing in its technical sense would be had finally on the evidence before the local officers. There may be occasions where the register and receiver would be justified in demanding the testimony taken before them, that they might see the witnesses and judge of their conduct and demeanor on the stand, but they should not insist upon this when it is evident that great hardship, amounting almost to denial of justice, will be the result. The witnesses in this case, both for the government and the defense, were, many of them, Mexicans, and their testimony given through an interpreter. This fact must have been known to the local officers, and unless they were familiar with that language, a fact that will not be presumed, they could gain but little by the personal presence of the witnesses. Again, most of the witnesses for the United States were from Trinidad and the vicinity of the land in controversy, and I am unable to see why it was not considered to the advantage of the government to have had the testimony taken nearer the land. It seems to me, viewed from any standpoint, that the action of the local officers was not only a gross abuse of discretion, but reprehensible in the last degree.

And I think the same may be said as to their refusal to allow the depositions to be taken. The showing made for this was clearly within the rules of practice (Rules 23 and 24). The witnesses resided more than fifty miles from the local office, and the necessary affidavits and interrogatories were filed. The reason given for this refusal, that all the papers were prepared by a disbarred attorney, are not borne out by the record. The motion is in the handwriting of Mr. Blunt; the interrogatories are printed, and I cannot say from the record that the affidavit is in Archibald's handwriting. The further objection of the register, that allowing "this motion would be equivalent to allowing the hearing" to be held at Trinidad, is equally without merit. A deposition is taken on direct and cross interrogatories, and is confined

to those prepared and submitted by counsel, and the answers are subject to all legal objections.

If the evidence in this case warranted the conclusions of the register and receiver, as affirmed by you, I should certainly remand the case for a further hearing, because of these inexcusable errors, and others equally flagrant. But under the circumstances I think the case may be settled without further delay.

The government assumed the burden of proof and attempted to show that Lopez had, in his life time, agreed to convey the greater portion of the land in dispute to other persons, some of whom resided on the land. It is shown that Lopez departed this life in May, 1889. The testimony relied upon to establish an alleged parol agreement is oral admissions made by Lopez, and in the same manner it is attempted to show the existence of a contract said to have been made by him with other persons, by which he agreed to deed them some of the land. This contract is not produced, or its absence accounted for, or even its execution established, and the only testimony in regard to it is hearsay. It needs no argument to show that this evidence is incompetent for this purpose. But even if the testimony were given full credence, neither the verbal promise or the written contract are proved. No witness testifies that he or she has any such agreement. The most they say is that they have heard there was such a promise out.

None of those Mexicans who have resided upon a part of the land are making any objection to the entry of Lopez, except one, who is shown to have a house on the line dividing Sec. 22 and 23. She owns more land in 23, and claims a possessory right to a small part of 22, as nearly as I can ascertain, three acres. But this testimony is too indefinite and uncertain upon which to find that this entry is fraudulent.

I am of the opinion that there is no competent testimony in this case to warrant the cancellation of this entry.

Your judgment is therefore reversed, and you will direct the local officers to inform the widow of the deceased that she will be allowed to submit final proof, after due notice, as required by the rules.

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PRACTICE—NOTICE OF APPEAL—RULE 70.

INSTRUCTIONS.

Rule 70 of the Rules of Practice as amended October 26, 1885, is revoked, and the rule as originally approved is restored and adopted.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

I have considered a communication from your predecessor dated January 5, 1892, addressed to The Secretary of the Interior, referring to the case of Horace H. Barnes (11 L. D., 621), and inquiring whether it

was intended in said case to revoke Rule 70 of the Rules of Practice, and suggesting that said rule appears to be a proper one, and that it should remain in force.

In response to said communication you are advised that it was not intended by the decision referred to, to formally revoke or modify Rule 70, as amended on the 26th day of October, 1885. It is nevertheless true that the decision in the Barnes case is clearly in conflict with said rule, in so far as it requires notice of an appeal from the rejection of an application to enter, to be given to the entryman of record. It therefore follows that either Rule 70, as amended on the 26th day of October, 1885, ought to be changed, or else the Barnes case should be overruled, for it will necessarily lead to confusion, and is manifestly unwise, to keep in force a rule of practice and at the same time sustain and follow departmental decisions squarely in conflict with such rule.

I have carefully examined the Barnes case and in my judgment the ruling therein made, "that Burrows is, by reason of his subsisting entry, a claimant of record for the land involved and as such is entitled to notice of the appeal herein," embodies a sound principle of law, conduces to the ends of justice and fair dealing between claimants for the same land.

Rule 70, as amended, has not been followed by the Department, see John A. Stone (13 L. D., 250), and Henry Hale (id., 365). Whatever reasons may have existed at the time it was done, for adopting amended rule 70, as it now stands, I am unable to perceive any reason at the present time for continuing said amended rule in force.

It is therefore ordered that said Rule 70, as amended October 26, 1885, be and the same is hereby revoked, and it is further ordered that Rule 70, as originally adopted and as printed in 4 L. D., on page 45 thereof, be and the same is hereby restored and adopted as a rule of practice in the place of said amended Rule 70.

APPLICATION FOR SURVEY—ISLAND—LAKE.

PATRICK BRAZIL ET AL.

On application for the survey of an island in a navigable lake in the State of Wisconsin the adjacent shore owners are not entitled to notice, as under the law of said State such owners are without interest.

A survey may be properly allowed of an island in a navigable lake, where it appears that such island was in existence at the date of the original survey, but was omitted therefrom.

Secretary Smith to the Commissioner of the General Land Office, September 21, 1893.

The Department, on July 11, 1892, returned to your office three applications, signed, respectively, by Patrick Brazil, William McArthur, and John E. Blaisdell, for the survey of three islands situated in Trout

Lake, in sections 13, 12, and 7, township 41 north, ranges 6 and 7 east, Wisconsin.

These applications were rejected, because there was no allegation that said islands were in existence at the date of the public surveys, the official plats on file in your office (approved January 27, 1865,) showing no island or islands in the locality described in the applications.

I am now in receipt of your letter ("E") of May 26, 1893, transmitting the affidavits of Charles Catfish, J. Quininige, Charles Turner, and Thomas J. Laughlin. The purpose of these affidavits is to show that the islands were in existence, in substantially their present form, size and condition, at date of original survey in 1865.

Catfish and Quininige are Indians; they sign by mark, and no attesting witness appears. It is not stated that they are credible witnesses, neither is it shown in the officer's jurat that the contents of their affidavits were explained to them before they were sworn as to the truth of the statements therein made. Such affidavits can not be accepted to establish facts upon which alone the survey would be authorized.

Charles Turner states that in 1869 he was at Trout Lake; that "there was at that time several islands in said lake which were timbered and probably as old as the lake itself;" that three of said islands are occupied by the applicants (names given), and there are several similar islands in said lake.

Thomas J. Laughlin testifies that in 1882 "the same islands were then present, fully formed, separate, and distinct from the main lands and from each other; that the growth of vegetation was as large on the islands as it was on the shores of the lake . . . every natural evidence points to the fact that these islands in Trout Lake are as ancient and distinct as the lake itself."

I think it sufficiently appears that the islands were in existence at date of the original survey and were omitted therefrom.

Trout Lake is situated in T. 41 N., ranges 6 and 7 E., 4th meridian. As represented on the photolithographic copy of the official plat, it is of irregular shape; its lower or southern part is about two and a half miles east and west in its widest part, and about the same distance running north and south; the opposite shores of the lake come almost together about one and one half miles south of the northern part of the township, whence they again widen out, forming another lake pyramidal in shape, two or three miles long with a general average of one and one half miles in width, the whole extent of the lake running north and south, including the narrow neck which joins the two parts, is about four and a half miles. The lake in its whole extent covers about 6,000 acres of land, or something over nine sections; it is meandered, and lots of various shapes and areas completely surround the lake and are numbered under the rules governing surveys.

The three islands sought to be surveyed are situated in the southern or larger part of Trout Lake.

The island claimed by Patrick Brazil is represented to contain about 9.33 acres; the improvements placed thereon by the applicant consist of a house one and one half stories high, eighteen by twenty feet, three windows and one door, ice house, and two acres cleared—value of improvements \$500. The width of the channel between the island and the west main shore (being the nearest shore to the island) is two thousand feet; the depth thereof at ordinary stages of water, about thirty-four feet; the island is about six and a half feet above high water mark—not subject to overflow, and the land fit for agricultural purposes.

The island claimed by McArthur is said to contain six acres; the width of the channel on the west side (nearest to the shore) is eight hundred and twenty-five feet; depth thereof thirty-four feet, and the island is eight feet above ordinary high water mark—not subject to overflow, and fit for agricultural purposes. The improvements placed thereon by the applicants consist of a house, twenty-four by twenty-eight feet, one acre cleared, and valued at \$500.

The island claimed by Blaisdell is said to contain ten and a half acres; the improvements placed thereon consist of a house sixteen by twenty-four feet, two acres cleared, ice house—valued \$500. The channel between the island and west main shore is one thousand nine hundred feet, and the water thereof at ordinary stages is about fifty-four feet deep; island six and a half feet above high water mark.

It will thus be seen that one of the islands is a little above one-fifth of a mile from the nearest shore, and the other two a little more than one-third of a mile therefrom.

From the size of the lake and the depth of the channel (thirty-four to fifty-four feet), it would appear that it is capable of sustaining floating crafts for commercial purposes. While there is no evidence that it has been so utilized, it must be regarded from the showing made as navigable.

Such being the facts, do the islands belong to the government, to the State, or to the riparian proprietors on the adjoining shores?

In regard to the ownership of the beds of navigable streams, the doctrine is well settled that each State has the right to determine that question for itself (*Barney v. Keokuk*, 94 U. S., 324), the shores of such streams and the soil under them being reserved to the several States through which they pass (*Pollard v. Hagen*, 3 How., 212). In Wisconsin it is the settled doctrine that the proprietor of lands on navigable streams takes to the middle thread of the current, subject, however, to the public easement, or right of navigation. (*Jones v. Pettibone*, 2 Wis., 308; *Mariner v. Schultz*, *idem.*, 693; *Yates v. Judd*, 18 *idem.*, 119.) To the same effect is the law of Illinois. (*Fuller v. Dauphin*, 124 Ills., 542.) The result of this doctrine is, that a proprietor of lands bordering on such streams may have his landed estate increased by the accre-

tion of alluvial deposits thereto, or by reliction of the waters therefrom, or by the formation of islands between his landed estate on the shore and the center of the stream.

But while this rule obtains in Wisconsin as to navigable streams, the case is there different as to large lakes or other natural collections of fresh water, which are navigable or adapted to the transportation by boats of the products of the country; the proprietorship of the bed of such lake is there held as being in the State, holding to the same doctrine as the States of South Carolina, New Hampshire, and Vermont. (*Delaplaine et al. v. Chicago and Northwestern Railway Company*, 42 Wis., 214.) And in all such cases the water's edge is the boundary of the title of the riparian proprietor, these rights resting upon title to the bank of the water, and not upon title to the soil under the water. (*Diedrich v. Northwestern Railway Company*, 42 Wis., 248.)

Notice of this application appears to have been served by registered letter upon the Wisconsin River Land Company at Eau Claire, Wisconsin, February 21, 1891, and no protest appears. Without discussing the validity of such service, or whether such company is the sole owner of the lands opposite to and nearest the islands, it is sufficient to say that by the law of Wisconsin, as above shown, the adjoining shore owners have no interest in the islands, and are therefore not entitled to notice.

It was held in the case of Benjamin F. Peterman (14 L. D., 115,) that an application for the survey of an island containing one hundred and forty acres of land, one-quarter of a mile from the nearest shore, the depth of the water being one hundred feet, should be allowed, although the official plats (as in case at bar) indicated no island thereon in the locality represented on the diagram, and no notice was given to the proprietors of lands on the adjoining shores. In that case, as in this, it was held that the island was in existence at date of original survey, and was omitted therefrom, and following the doctrine laid down in *Webber v. The Pere Marquette Boom Company*, 62 Mich., 625, the survey was ordered.

Trout Lake being navigable, and the islands in question having been in existence in substantially their present form at date of original survey, and not yet disposed of, the same must be regarded as belonging to the United States, and jurisdiction is therefore conferred under the general laws for their survey and disposition.

I am not unmindful of the recent doctrine laid down in *Hardin v. Jordan*, 140 U. S., 372. The lake in that case, while designated on the official maps as "navigable," was in fact "a non-navigable fresh water lake or pond," of only two or three miles in extent, and, following the Illinois doctrine which was held to be that of the common law, pure and simple, the court decided that the title to the bed of the pond, and all islands and ridges of land within the meander line of the same, passed to the riparian proprietor.

The facts in the case at bar are not only different from those in the Hardin-Jordan case, but the local law of the two States as to inland lakes and ponds is widely different.

In directing the survey of the islands, the applications for which are hereby approved, care should be exercised in keeping the cost of the survey within the limits of that authorized by law.

The land will be disposed of at public sale, under section 2455 of the Revised Statutes, providing for the sale of isolated or disconnected tracts of land.

STATE OF SOUTH DAKOTA *v.* VERMONT STONE COMPANY.

Motion for review of departmental decision of March 3, 1893, 16 L. D., 263, denied by Secretary Smith, September 23, 1893.

TIMBER CULTURE ENTRY—PARTNERSHIP.

KITCHEN *v.* RANDALL.

A timber culture entry made for the benefit of a partnership, composed of the entryman and another, is illegal, and must be canceled.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1893.

I have considered the case of Edgar Kitchen *v.* Henry J. Randall, on appeal by the latter from your decision of April 11, 1892, holding for cancellation his timber culture entry for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 8, T. 156 N., R. 55 W., Grand Forks, North Dakota.

This entry was made on August 19, 1885, and contest affidavit was filed against it July 30, 1890, alleging that the entryman did not plant the requisite number of acres of the tract to trees, tree-seed or cuttings during the third or fourth years of the entry, nor up to the present time (date of filing affidavit), and that the entryman was holding the land for speculative purposes.

Upon due notice, hearing was had, and the local officers recommended that the contest be dismissed, and also that the entry be canceled, from which both parties appealed. You passed upon the case and modified said decision, allowing the contest to remain, but holding the entry for cancellation. From this decision the entryman appealed.

The testimony shows that Randall and one Curry were partners, and that Randall made this entry for the partnership. They lived in Illinois, but Curry, it appears, visited the land, and had fifteen or twenty acres broken within the first year. This was cropped to oats the second

year, and during the third year fifteen or twenty acres more land was broken, and it appears by the evidence of one witness that some trees were set out in a strip of the land, and the balance of the broken land was cropped. None of the trees grew, and the next year the entire broken portion of the tract was plowed and sowed to wheat. Stock was grazed on the remaining portion of the land.

Randall says on examination, that Curry was to have half of what they made out of the entry, less \$100, and that he has reported the matter to Curry's administrator, and expects to settle with him and pay Curry's estate its share. The \$100 was for his right, which he exhausted by making the entry.

There is some testimony about planting tree seeds the fourth year, but there is no competent evidence on that matter. The entryman says that he had the planting done, but the man who did it is not produced, and all that the entryman knows is from what he has heard. One witness says he saw Curry have about a peck of box-elder seeds, and he said he had to go out and plant some trees on the land; this was in 1888. It came out that in the same conversation, Curry said he was afraid some one would jump the claim.

The cuttings were carelessly put in the ground, and did not grow; if any seeds were planted, they failed to germinate and the next year, instead of following up the effort to grow trees, the entire body of broken land was sown to wheat.

Before the hearing, the man who stuck the cuttings in the ground, was sent by the entryman to the land to measure the "tree claim,"—the planted portion of the land, but he says it was impossible to tell where the lines were, and he did not measure it; that is, the pretended "tree claim" was obliterated.

The act of June 14, 1878, (20 Stat., 113) provides what the affidavit of an applicant to make timber culture entry, shall contain, and *inter alia* it uses these words: "That this filing and entry is made for my own *exclusive* use and benefit." It further contains the words, "I have made the said application in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever." From this it will be seen that this entry was illegally made; this man may have thought that there was nothing wrong in selling one half of his right to make entry, to his partner, and he may not have noticed that this entry was not for his "exclusive use and benefit", but the fact remains that the entry was made by an evasion of the law. A partnership cannot make an entry, and a partner, acting as agent of a partnership, cannot do for it what it cannot lawfully do for itself.

There is no evidence showing that the entry was made for speculation; this firm intended to hold it for farming purposes, and that branch of the case fails, but the entry will have to be canceled because illegally made, and I think, upon a fair consideration of the evidence,

the charge against the entryman, of failure to plant trees, tree seeds or cuttings, is sustained, and your decision, for the reasons above given, is affirmed, and the entry will be canceled.

TIMBER LAND ENTRY—UNOFFERED LAND.

WARD v. MONTGOMERY (ON REVIEW).

The status of public land, at any time, as to its being "offered" or "unoffered," is determined by the fact as to whether or not it has been offered at public auction, at the price fixed by existing law.

The timber and stone act of June 3, 1878, authorizing entry of lands "which have not been offered at public sale according to law," includes lands that, at the date of the passage of said act, had not been offered at public auction at the price then fixed by law.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1893.

I have considered the motion of the plaintiff in the above entitled cause, for a review of departmental decision of September 10, 1892, (15 L. D., 280), involving timber land entry No. 3008 of the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 30, T. 9 N., R. 1 W, made by the defendant March 21, 1889, in the Vancouver, Washington, land district.

The ground upon which the motion for review is based is, that an important question presented by the record in this case is—whether this tract of land had been offered at public sale, according to law, at the time that defendant Montgomery's application was made to purchase the same under the timber and stone act—and that *this* question does not appear to have been *duly* considered by the Hon. Secretary in disposing of this case.

The question presented by the motion as above set forth involves the construction of the following clause in section one of the timber and stone act, viz: "and which have not been offered at public sale according to law."

The proper construction of said clause as contended by the plaintiff depends upon not whether these lands were in the category of "offered" or "unoffered" lands under existing laws at the date of the passage of the timber and stone act, viz: June 3, 1878, but whether these lands *had ever* "been offered at public sale according to law," (any law) prior to said date. That if they had *ever* been so offered, then under a strict construction of said act, or of the clause thereof above quoted, which strict construction he contends should obtain, the lands in question would be exempt from entry under said act. That the language of said act is clear, forcible, and free from ambiguity and is not susceptible of any construction other than that conveyed by the ordinary meaning of the language therein used. That if the character of "offered" ever attached to these lands, they are excluded from the operation of said act.

The language of the decision sought to be reviewed covering the construction of the clause above referred to is as follows:

The only serious question presented by the record is, whether the land was of the class denominated "offered lands" at the date of said entry, and on that account not subject to entry as timber land. This question was not before the Department when Montgomery's said proof as to the character of the land was considered, and was not passed upon. From an inspection of your records it appears that said township was offered in 1863 and falls within the primary or granted limits of the grant to the Northern Pacific Railroad Company by the act of Congress approved July 2, 1864 (13 Stat., 365); and the joint resolution of May 31, 1870 (16 Stat., 378), and by the terms of said grant it is declared that "the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale." The effect of this provision is to take said township out of the class of "offered lands" and prevent the tracts therein from being sold until duly offered. It does not appear that this tract was ever offered for sale at public auction at the enhanced price, and hence it falls within the class mentioned in the timber-land act, namely, "which have not been offered at public sale according to law."

The Hon. Secretary then proceeds in said decision to quote from the case of *United States v. Budd* (43 Fed. Rep., 630), in which the clause in controversy is construed as follows:

I think a reasonable construction of the statute would limit the application of the words, "and which have not been offered for sale according to law," to lands which at the date of the act belonged to the class of unoffered lands, as contradistinguished from what, in the practice of the land department, is known as "offered" lands; that is, lands which are subject to private cash entry at the minimum price. By the insertion of this clause in the statute no more was intended than to avoid the absurdity of making a law providing for the sale of land at the price of \$2.50 per acre, under prescribed limitations and restrictions, which, under existing laws, were already subject to sale at one-half that price, without the limitations and restrictions. So viewing the statute, as this particular tract of land had been withdrawn from sale at a time prior to the date of the statute, its *status* was at the date of that act that of unoffered lands; and if otherwise of the character described in section 1, was subject to sale under this statute, and the sale of it to Budd was lawful.

It is a matter to be regretted that the question above passed upon was not considered by the supreme court on appeal of the Budd case, and a precedent of binding force established for the guidance of this Department. The decision of the circuit court in that case was affirmed by the supreme court on every question save the one here in controversy, and while that is passed over without comment, I believe it is reasonable to infer an acquiescence therein on the part of that august tribunal. At any rate, while the construction placed upon the clause in question, in the Budd case, is of binding force on this Department only in so far as it convinces the judgment, yet emanating as it does from a tribunal of the dignity, reputation, and learning of the United States circuit court, it is entitled to the most profound and respectful consideration. It is a judicial interpretation, and ought to be sufficient authority for adopting the same construction. (*Sutherland on Statutory Construction*, Sec. 310.)

In the case of *Eldred v. Sexton*, 19 Wall., 195, the supreme court say—

It is a fundamental principle underlying the land system of this country, that private entries are never permitted until after the lands have been exposed to public auction, at the price for which they are afterwards subject to entry.

The status of the public lands, at any time, therefore, as to their being "offered" or "unoffered," is determined by the fact as to whether or not they have been offered at public auction, at the price fixed by existing law.

The price of the lands in controversy at the date of the passage of the timber and stone act, was \$2.50 per acre; they had not been offered at public sale, at that price; hence they were "unoffered" lands, under the rule laid down in *Eldred v. Sexton*, *supra*, and "had not been offered at public sale according to law."

A reference to authority will hardly be required to establish the proposition that the legislative intent must control in the construction of statutes. Now, it is reasonable to presume that Congress, when it passed the timber and stone act, did not intend to clash with the line of reasoning followed by the supreme court in *Eldred v. Sexton*, *supra*, and the precedent there established, and that when it included in section one (1) of said act, the clause, "and which have not been offered at public sale according to law," it meant existing law, and as the land in controversy at the date of the passage of said act had not been offered at public auction at the price then fixed by law, it "had not been offered at public sale according to law," within the meaning of that clause, and hence was subject to entry under the timber and stone act.

The Hon. Secretary, in his letter of instructions to the Commissioner of the General Land Office, of date February 21, 1893 (16 L. D., 326), in referring to the Budd case, the case of *Eldred v. Sexton*, and the decision sought to be reviewed herein, uses the following language—

The result of these decisions, and the acts of Congress, may be summarized as determining that surveyed lands, in the public land states, valuable chiefly for timber, which at the date of the act of 1878 belonged to the class of unoffered lands, may be sold under the provisions of said act.

For the reasons herein stated, and for the further reason that I believe the question presented by the motion to review, was fully considered in the decision of September 10, 1892, and that nothing new is presented for my consideration, I discover no reason for disturbing the decision heretofore made in the case. The motion is therefore denied.

OKLAHOMA TOWNSITE-PUBLIC RESERVATION.

INSTRUCTIONS.

Land set apart for court house purposes and included in a tract patented to townsite trustees under the act of May 14, 1890, may be conveyed by the Secretary of the Interior to the person or persons having official charge of such matters on behalf of the county.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1893.

I am in receipt of your letter of the 26th ultimo, transmitting for my consideration letters of James M. Bishop, chairman of townsite board No. 4, Oklahoma, dated respectively July 7 and 10; also letter of L. L. Briggs, mayor of the city of Norman, Oklahoma.

These gentlemen call attention to the first proviso of section 22 of the act of May 2, 1890 (26 Stat., 81), and to section 4 of the act of May 14, 1890 (ib., 109), and ask as to the proper disposition of block 37 in said city of Norman. You state that said block is a portion of the tract of land patented October 1, 1890, to Oklahoma townsite board No. 4 in trust for the use and benefit of the inhabitants of the townsite of Norman. It seems from the letters which you transmit that block 37 herein referred to was in 1889 set apart by the city officials of Norman for court house purposes, and has since been known and recognized by the people of the town and county as "court house block," and that when the townsite entry was made in 1890 by the trustees in trust for the occupants, they took notice of the fact that said block was set apart for court house purposes, and no individual applications were allowed to be filed for lots in said block. The chairman of the present townsite board, Mr. Bishop, states that at the time of the townsite entry by the trustees he was chairman of the board of county commissioners, and desired to make application for the block in question for county purposes, which was not allowed by the trustees, for the reason that the block having been set apart as a reservation, they had no authority to deed it.

Thus it still shows as a reservation, but, as already stated, a reservation understood by the populace to be for county purposes, and known as "court house block."

Under this view as to the character and purpose of the reservation, acquiesced in by town and county alike, a jail has been erected at a cost of \$5,000, and a court house is in course of erection. The mayor asks officially that the present townsite board be directed to deed said block to the county commissioners of Cleveland county, Oklahoma, for the use of said county.

The first proviso of section 22 of the act of May 2, 1890, entitled, "an

act to provide a temporary government for the Territory of Oklahoma," etc., reads—

That hereafter all surveys for townsites in said Territory shall contain reservations for parks (of substantially equal area if more than one park) and for schools and other public purposes, embracing in the aggregate not less than ten nor more than twenty acres; and patents for such reservations to be maintained for such purposes, shall be issued to the towns respectively when organized as municipalities.

Section 4 of the act of May 14, 1890, provides—

That all lots not disposed of as hereinbefore provided for shall be sold under the direction of the Secretary of the Interior for the benefit of the municipal government of any such town, or the same or any part thereof may be reserved for public use as sites for public buildings, or for the purpose of parks, if in the judgment of the Secretary such reservation would be for the public interest, and the Secretary shall execute proper conveyances to carry out the provisions of this section.

The question raised by the facts as herein stated, and by your letter, is,—may block 37, in the city of Norman, be deeded, and if so, to whom?

The fourth section of the act of 1890 (*supra*) provides for the execution of proper conveyances to carry out the provisions of this section.

I think it must be held that deeds of conveyance must be made for all lands falling within the purview of said section, those reserved for public use as well as those sold. This, for the reason that the trustees holding the title, will, in the nature of things, and under the terms of the first section of the act, in the course of time, have executed their trust and become functus as a board, while the title should be lodged where it can be held and continued by succession under proper conveyance.

Now, if the block here in question, at present held in reservation, may and should be deeded and conveyed, to whom shall the conveyance be made? Under the section of the law last above quoted, the provision for reservation "for public use as sites for public buildings" is broad and general in its terms, and may, I think, fairly be construed to include ground set apart for court house purposes. If so, it seems clear that the conveyance should be made to the person or persons having official charge and control of such matters in behalf of the county.

You will cause block 37 to be disposed of in accordance with the views herein expressed.

The letters of James M. Bishop, dated July 7th and 10th last, respectively, and that of L. L. Briggs, dated the 11th ultimo, are enclosed herewith for the files of your office.

PRE-EMPTION—RESIDENCE—SECTION 2260 R. S.

SCOTT v. CARPENTER.

The validity of a pre-emptor's residence is not affected by the fact that his wife refuses to live on the land.

The ownership of city property, and removal therefrom, does not bring a pre-emptor within the inhibitory provisions of the second clause of section 2260 R. S.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1893.

I have considered the case of Roswell M. Scott v. Ara Carpenter, on appeal by the former from your decision of April 23, 1892, dismissing his protest against the final proof of the latter, and cancelling the homestead of the former for lots 7, 13 and 14, and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 31, T. 38 N., R. 5 E., Seattle land district, Washington.

On May 18, 1887, the plat of the survey of the township embracing lots 7, 13 and 14, and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of said Sec. 31, T. 38 N., R. 5 E., was filed in the local office, and on June 9th following, Carpenter filed his pre-emption declaratory statement for said land, alleging settlement July 1, 1885. On July 1, 1889, Scott made a homestead entry, No. 11,784, for the land.

On November 21, 1889, Carpenter offered final proof on his pre-emption filing. Scott protested this proof, alleging:

For cause of protest, . . . that he, the undersigned, is the same R. M. Scott who, on the 1st day of July, 1889, made and filed in said land office, his homestead entry, No. 11,784, for the above described land, which said entry is valid and subsisting, and under which the undersigned has established his residence upon said land, and improved and cultivated the same in good faith, and for the further reason that said Ara Carpenter has never established his residence upon said land, but has, ever since the date of his said pre-emption declaratory statement, lived and resided away from said land, and in the city of Seattle, above mentioned.

Hearing was had upon this protest, and on October 17, 1890, the local officers rendered their decision, recommending the cancellation of Scott's homestead entry, and the acceptance of Carpenter's final proof. From this decision Scott appealed. You affirmed their decision, and held the entry for cancellation, from which he again appealed.

The evidence shows that Carpenter is a married man, and that his wife is living; they have two children, both of age; the son at date of hearing was past twenty-five years, and the daughter, a married woman, was past twenty-two years of age.

The wife of Carpenter was a midwife and nurse, and followed her profession. Carpenter was a drinking man when he was about saloons and places where liquors were sold. In 1885, while his wife was away from home, he went to this land, in the forest, and went to work improving it; he was gone from Seattle, where his wife lived, about fourteen months, during which time he had cleared and got under cultivation a part of the land, and had quite a comfortable shanty and some other

improvements. When he went back to Seattle, he wanted his wife to sell two lots that she had bought, and go with him to his home, and use her money in helping to improve the place. This she refused to do, giving as a reason that she could do better following her profession; that they could not then make a living on the pre-emption. She was willing to help him and did help him, but she says he drinks badly when he can get liquor, and that he had squandered the property she had inherited, and that she would not sell her lots; that they were increasing in value. She had borrowed some money (\$5000) and built a house, which she rented; beside this she had a house in which her son-in-law and daughter lived, and she stayed there when not out nursing the sick. She says that she and her husband have not permanently separated, and that when he came to Seattle he came to see her, and they live together as husband and wife. He built a very good house on his land, one and one-half stories high, with good floor and good roof; has a barn, wood-shed, well of water, eight acres cleared and four acres slashed, beside a good deal of fencing, and his improvements are estimated at \$1500. When he had his house completed he induced his wife to come to the farm, and tried to persuade her to stay—he desires to live there because he can keep away from whiskey—the wife states that she can get along better at Seattle.

It is sufficient to say that the evidence shows that this man made his residence on his pre-emption claim, and has maintained it there, and the fact that his wife declines to live with him, cannot affect the legality of his residence. He voted regularly in the precinct where his land is situated, and the question of his residence was never raised at such times.

The fact that the lots purchased by the wife with her own earnings have increased in value, and that she has an income from them, cuts no figure in the case.

It is not charged in the affidavit, that the claimant removed from land of his own within the State, and that question is not in the case, except that it is raised in the appeal and in the argument of counsel. But had the charge been made in the affidavit, and been brought regularly before the Department, I do not consider that the ownership by the wife, of two town lots, or even by himself, would constitute such a condition as would inhibit him under clause 2, Section 2260, R. S., from filing his pre-emption declaratory statement for the land in question.

In the case of *Sturgeon v. Ruiz* (1 L. D., 490) it was said: "The tenth section of the act of 1841, (Sec. 2260, R. S.) has been uniformly held to extend to residents upon agricultural lands only, and not to debar a pre-emptor who moves from his own home in a city, town, or village, upon a pre-emption claim." This case was cited and followed in the case of *Ball v. Graham* (6 L. D., 407), and also in the case of *Florence Brey* (9 L. D., 512). It cannot therefore matter that under the law of

Washington, the husband and wife have community interests in the lands, held by either.

I am satisfied that the local officers did not err in their conclusions of law and fact, and that you correctly affirmed their decision.

Your decision is therefore affirmed, Roswell M. Scott's homestead entry will be cancelled, and the pre-emption filing will remain intact.

REPAYMENT—DESERT ENTRY—EXCESSIVE PAYMENT.

FRANK A. WHITE.

There is no authority for the repayment of double minimum excess erroneously required under a desert land entry of an even section within the limits of a railroad grant.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1893.

On the 20th of May, 1891, Frank A. White filed an application to make desert land entry for the S. $\frac{1}{2}$ of Sec. 28, T. 7 S., R. 20 E., Bozeman land district, Montana. The land was within the granted limits of the Northern Pacific Railroad, and the local officers required him to pay fifty cents per acre at the time of his application.

On the 28th of November, 1891, he made final proof, and completed his entry, when he was required to pay an additional sum of two dollars per acre, making \$2.50 in all.

On the 9th of March, 1892, he filed in the local office an "application for the repayment of the excess purchase money the sum of four hundred dollars, paid on said entry, as per certificate No. 193, issued at Bozeman, Montana, bearing date the 28th of November, 1891." In connection with such application he made oath that he had not sold, assigned, nor in any way encumbered the title to the land described.

The local officers transmitted the application to your office, and on the 2nd of April, 1892, you rendered a decision in the case, denying said application, and citing the case of Henry L. Davis (12 L. D., 632), in support of your action. An appeal from your decision brings the case to this Department.

Under the facts in this case, and the act of March 3, 1877, as amended by the act of March 3, 1891 (26 Stat., 1095), fixing the price of desert land entries at one dollar and twenty-five cents per acre, without regard to the situation of the land with relation to the limits of railroad grants, there is no question but that White was required to pay \$400 too much for his land. And the only question before me for my consideration is, whether or not the Secretary of the Interior has the power to repay to White that \$400 after it has found its way into the Treasury of the United States.

It is a well known rule of law that no public officer has power to pay money out of the Treasury of the United States, without a statute expressly authorizing him so to do, and however just and equitable the claim of White may be, unless there is in existence a statute authorizing repayment by the Secretary of the Interior in cases of this character, no relief can be granted.

All the legislation on the subject of repayment is found in the Revised Statutes, sections 2362 and 2363, and in the act of June 16, 1880 (21 Stat., 287). Section 2362 authorizes repayment only in cases where land has been erroneously sold and the sale cannot be confirmed. Clearly the provisions of that section do not apply to the facts in this case. Section 2363 provides that where land has been erroneously sold, as mentioned in section 2362, and the proceeds of the sale invested in stocks or otherwise held in trust, the stocks may be sold or the trust funds may be used to repay the purchase money. This section does not apply to the facts in the present case.

The first section of the act of June 16, 1880, relates to repayments in cases of soldier's homestead entries, and has no reference to such a state of facts as exists in this case. The second section of that act provides that where entries are canceled because erroneously allowed and cannot be confirmed, the Secretary of the Interior may make repayment, and the further provisions of said section are as follows:

And in all cases where parties have paid double minimum price for land which has been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or his heirs or assigns.

This is all the legislation by Congress on the subject, and none of the acts referred to apply to the lands in question, nor the facts in this case.

The land in question was, when entered, and is now, an even section "within the limits of a railroad grant," and hence it does not fall within the provisions of the second section of the act of June 16, 1880, *supra*. As there is no statute in existence empowering the Secretary of the Interior to make repayment in cases of this character, your decision is affirmed.

GARTLAND *v.* MARSH.

Motion for review of departmental decision of February 15, 1893, 16 L. D., 140, denied by Secretary Smith, September 23, 1893.

ARID LAND ACT—PRE-EMPTION CLAIM.

EMILIO TORRES.

The existence of a pre-emption settlement and filing does not withdraw the land covered thereby from selection as a reservoir site under the arid land act, but, if such selection is not finally approved the pre-emption claim may then be perfected.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1893.

On the 23d of February, 1891, Emilio Torres filed his pre-emption declaratory statement for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 21, T. 10 S., R. 3 W., Las Cruces land district, New Mexico, alleging settlement on the 2d of that month.

He made final proof on the 14th of May, 1892, which was rejected by the local officers, for the reason that the land had been selected for reservoir purposes, and suspended from disposition by letter of November 14, 1891.

From such decision he appealed to your office, alleging that he had fully complied with all the requirements of law; that his settlement and occupation were long prior to the suspension mentioned, and that, payment being tendered, entry should be allowed.

On the 23d of July, 1892, you rendered a decision in the case, holding that the filing of Torres did not withdraw the land embraced therein, from appropriation by the government, and that as the tract had been selected as a permanent site for a reservoir by the Director of the Geological Survey, Torres was precluded from perfecting his entry. You added that "should it hereafter be found not necessary for this purpose, then he might enter, should no further objection be found."

He brings the case to the Department by appealing from your decision, claiming that he having complied with the law, the United States has no right to withhold final receipt and patent, and he asks that the local officers at Las Cruces be directed to issue to him proper final receipt for said land.

The act reserving lands for reservoirs, canals, ditches, etc., for irrigating purposes, passed October 2, 1888, (25 Stat., 526) reserved from sale as the property of the United States, all such lands as should thereafter be designated or selected for such purposes, until further provided by law.

The act of August 30, 1890, (26 Stat., 391) repealed so much of the act of October 2, 1888, as provided for the withdrawal of the public lands from entry, occupation and settlement, and allowed settlement and entries to be made upon said lands "in the same manner as if said law had not been enacted," adding, however, "except that reservoir sites heretofore selected, shall remain segregated and reserved from

entry or settlement, as provided by said act, until otherwise provided by law."

By the 17th section of the act of March 3, 1891, (26 Stat., 1095) it was provided

that reservoir sites located or selected, and to be located and selected, under the provisions of the act of October 2, 1888, and amendments thereto, shall be restricted to, and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs, excluding, so far as practicable, lands occupied by actual settlers at the date of the selection of said reservoirs.

Reservoir site No. 38, on the Rio Grande River, New Mexico, was selected on the 27th of February, 1891, and embraced the lands in question. Such selection, therefore, did not come within the provisions of the act of August 30, 1890, not having been made prior to the passage of that act, but is controlled by the act of March 3, 1891, which excluded from reservoir sites, so far as practicable, lands occupied by actual settlers at the date of the location of said reservoirs.

On the 27th of February, 1891, when the site for reservoir No. 38 was selected, the land in question was occupied by an actual settler. It should therefore be excluded from the site, unless "actually necessary for the construction and maintenance of said reservoir."

Under date of March 21, 1892, you transmitted to this Department an abstract, showing the status of the lands in reservoir site No. 38, and among the lands covered either by pre-emption declaratory statements, or by entries made subsequent to date of selection for a reservoir site, and therefore subject to selection for that purpose, is the tract in question.

The map accompanying said abstract, shows the land to be actually necessary for the construction and maintenance of said reservoir, as it is represented as being, or to be, entirely covered by water. This map, abstract, etc., have not yet been finally passed upon and approved by the Secretary of the Interior, but as the case now stands, I cannot grant to Torres the relief asked for by him in his appeal to the Department.

He was aware that the land was subject to selection for a reservoir site, and within a few days after his settlement and filing, it was in fact so selected. This was before he could have expended a very large sum in improvements, the value of which were placed at \$200 at the time of making final proof. Had he desired to segregate the land, he should have made entry, instead of filing therefor. His filing did not withdraw it from appropriation by the government, and I can only repeat what you in effect said, that if it should hereafter be found not necessary for the purpose of constructing or maintaining reservoir site No. 38, or such selection should not be finally approved, he may make entry for the land, if there be no other objection. The decision appealed from is sustained.

SETTLEMENT CLAIM—NOTICE.

MILES v. WALLER (ON REVIEW).

Actual notice of the extent of a settlement claim will protect such claim as against the subsequent entry of another, when such notice is supported by actual settlement and improvements upon contiguous land.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1893.

On the 17th of March, 1893, you transmitted, on the part of Frank M. Miles, motion for review of the decision of the Department of January 6, 1893, in the case of said Miles against John Waller (16 L. D., 12), in which the rights of Waller to the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 28, T. 34 N., R. 37 E., Spokane land district, Washington, were held to be superior to those of Miles.

On the 23d of June, 1890, both Miles and Waller appeared at the local office, to make homestead entries for land. The application of Miles was for the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 32, the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 29, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 28, said township and range, while Waller applied to enter the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 28. It will be seen that the two conflict as to the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 28.

A hearing was appointed to determine their respective rights. The local officers decided in favor of Waller, and their decision was affirmed by you on the 3d of March, 1892. Your judgment was affirmed by the Department, in the decision of which a review is asked.

In the decision complained of the Department found that Miles established his residence upon land in Sec. 29, in 1883, and that he sent a written notice to Waller, in 1888, informing him that he claimed the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 28, T. 34 N., R. 37 E., the forty-acre tract in controversy. After finding this fact, it was added: "But such written notification is of no validity in the absence of the settlement and residence required by law." No departmental decision is cited in support of this proposition, and I think no case can be found, holding that settlement is confined by law to a technical quarter section. The Department has frequently held that the notice given by settlement and improvements extends only to the technical quarter section upon which they are located. This was held in the case of Pooler v. Johnson (13 L. D., 134), and in other cases therein cited, but in that case the doctrine laid down in Cooper v. Sanford (11 L. D., 404), that "actual notice of the extent of a settlement claim will protect such claim as against the subsequent entry of another," was recognized.

In the case last cited, it was held that actual notice of the extent of a claim was as good as that given by improvements, it being impracticable for a settler to place improvements on all the subdivisions of his claim at the instant of settlement. I think, therefore, the language

quoted from the decision complained of, is not in harmony with the decisions of the Department, but, rather, that the position of the Department is, that notice given in any competent manner is sufficient.

This leads to the conclusion, that if Waller had done nothing to establish a claim to the forty acres in controversy, prior to the written notice served upon him by Miles, in 1888, the latter has the superior right to the land.

The land for which both parties sought to make entry on the 23d of June, 1890, was not open to entry until that day, although prior to that time it was subject to settlement. It appears that in the spring of 1887, Waller built a house upon the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 29. He desired to include in his claim the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 28, but a person named Floyd Lawson also wanted to secure the whole or a part of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section. Waller fenced about seventy-five acres of the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Sec. 28, and built a log cabin for a granary on the forty-acre tract in question, and broke four acres in 1886, and raised a crop on it in 1887. He had, at the time of the hearing, eighteen acres in grain, potatoes and corn, and he cultivated it in crops every season since 1886.

In April, 1890, he removed his house to the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 28, which he had all the time included in his claim, and abandoned the forty acres in Sec. 29, upon which he had previously been living. This reduced his holdings to the three forty-acre subdivisions in Sec. 28, for which he applied to make entry.

In 1883, Miles made settlement upon lands in Sec. 29, contiguous to the land in controversy. He made no improvements upon the land in Sec. 28, prior to his giving notice to Waller that he claimed the same, in 1888.

In your decision you found that he would not then have made a claim to said land, had not a new survey of the township, then just made, put some of his fence, which he supposed was upon the line between sections 28 and 29, upon the land in question.

You found that under the circumstances of the case, the claim of Miles to the land could not date from the time of his settlement upon the contiguous land in Sec. 29, in 1883, but from the time of his notice to Waller, in 1888, and that as Waller had, prior to such notice, improved and cultivated the land, his rights thereto were superior to those of Miles.

I think your conclusion was correct, and that the Department did not err in affirming your decision, although some of the reasons given for such affirmance were erroneous.

The ruling in the decision complained of, that written notice of the extent of a settlement claim, "is of no validity in the absence of settlement and residence," will not be adhered to by the Department, but rather the rule as stated in *Cooper v. Sanford*, that "actual notice of

the extent of a settlement claim will protect such claim as against the subsequent entry of another," when such notice is supported by actual settlement and improvements upon contiguous land.

This would hold that the notice of Miles, who lived and had improvements on land contiguous to that in question, although in another section, was sufficient.

In the case at bar, however, it having been found that Waller's settlement upon the land in question, was not subsequent to the notice by Miles, but prior thereto, the latter was not injured by the erroneous ruling complained of, and the motion for review of said decision is accordingly denied.

APPLICATION TO ENTER—RAILROAD LANDS—SETTLEMENT.

MILLS v. DALY.

An application to enter, to be valid, must be made at a time when the land is free from appropriation, and legally subject to entry.

The forfeiture of railroad lands declared by the act of September 29, 1890, was complete on the passage of said act, and opened to settlement immediately the lands designated therein.

A settlement on such lands, after the passage of said act, and prior to the time when the lands were open to entry, is protected as against the intervening entry of another, if asserted within three months from the time when said land is subject to entry.

A formal application to enter, made within three months from settlement, is not required to protect such settlement as against the intervening entry of another, if the settler initiates a contest against said entry, alleging his own priority, within three months after the land becomes subject to entry.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1893.

The land involved in this controversy is the SE. $\frac{1}{4}$ of Sec. 7, T. 49 N., R. 8 W., Ashland district, Wisconsin. It was within the granted limits of the Portage, Winnebago and Superior Railroad, (now the Wisconsin Central) and was restored to the public domain by the forfeiture act of September 29, 1890, (26 Stat., 496).

The 23d of February, 1891, was fixed by official notice as the day for the allowance of entries on said lands, and on that day Albert J. Daly made homestead entry for the above described tract.

On the 17th of March, 1891, Edward Mills filed an affidavit of contest against said entry, alleging that Daly was not entitled to the benefit of said entry, for the reason that he (Mills) applied to make entry for the land on the said 23d of February, 1891, at an earlier hour than Daly, and that he was residing on the land at the time of making said application, and had made valuable improvements thereon, while Daly had not then settled on the land.

A hearing was had, after which the local officers, on the 10th of

July, 1891, rendered their decision in the case, in which they held that the settlement made by the contestant upon the land did not entitle him to a preference right of entry therefor. Such decision was reversed by you on the 19th of May, 1892, and an appeal from your judgment brings the case to the Department.

The evidence in the case shows that Mills first went upon the land on the 5th of December, 1890, at which time there was a log house thereon, partly completed. This he purchased for \$25, and during that month completed its construction and occupied it for two or three nights the latter part of the month, having put into it a stove and some provisions. He also did some clearing during that month, and the following January, and slept in the house a few nights in January and February, 1891, being absent at work in a logging camp a good portion of the time. At the time of the hearing he had a patch sown to rutabaga seed, and another patch prepared for planting potatoes. He was a single man, twenty-three years of age.

The record also shows that an application to make homestead entry for the land, accompanied by the necessary affidavits, made by Mills, was received at the local office by mail, on the 23d of February, 1891. It was rejected for the reason that it was thought to conflict with a soldier's declaratory statement. The local officers afterwards discovered that they were in error, as said declaratory statement was for land in range nine, west, instead of range eight. In the meantime, however, the entry of Daly had been allowed.

The application and affidavits of Mills were made on the 21st of February, 1891, before a United States court commissioner. This was two days prior to the time when the land was open to entry. The ruling of the Department is that an application, to be valid, must be made at a time when the land is free from appropriation, and legally subject to entry. This was distinctly stated in a circular of instructions, issued to registers and receivers, under date of January 8, 1878, (4 C. L. O., 167). This circular was in accordance with the views of the Department, expressed in the case of Hiram Campbell (5 C. L. O., 21), which was decided December 22, 1877, and which held that "in no case can an affidavit, made while the land is appropriated, under the provisions of law, be received." The same doctrine was held in the case of Johnson Barker (1 L. D., 164); Staab v. Smith (3 L. D., 320), and in Holmes v. Hockett (14 L. D., 127).

It seems, therefore, that the application of Mills to make entry for the land was properly rejected, although the proper reason for such rejection was not endorsed upon the papers by the local officers.

In the case of the Southern Pacific Railroad Company v. Hammond (14 L. D., 359), it was held that the forfeiture declared by the act of September 29, 1890, was complete on the passage of the act, and opened to settlement immediately the lands designated therein. While not subject to entry until February 23, 1891, the land in controversy was

subject to settlement at any time after September 29, 1890. In *Neil v. Southard* (16 L. D., 386), it was said: "An application to enter land confers no greater rights than settlement, and gives to the applicant no claims superior to those of an actual settler upon the land at the time the application is made."

This doctrine was also recognized in the case of *Gillen v. Beebe, et al.* (16 L. D., 306), in which it was held that "a settlement made on the reservoir lands opened to disposition by the act of June 20, 1890, after the beginning of the calendar day fixed for such opening, and prior to the entry of another, made on the same day, for the same tract, defeats the right of the entryman." In that case the settlement was made "between the hours of 12 and 1 o'clock, a. m., of December 20, 1890", while the entry was made at the opening of the land office on that day. See also *Johnson v. Crawford* (15 L. D., 302).

Counsel for Daly admit that if Mills had been an actual settler, in good faith, on this land prior to February 23, 1891, and if he had within three months, filed a legal application to enter the land, Daly's entry should be canceled, and that of Mills allowed. It is claimed, however, that neither of these conditions appear.

In the case of *Rumbley v. Causey* (16 L. D., 266), it was decided that it was not necessary to make an application to enter land within three months after settlement, in cases where the land was already covered by a prior entry, and that bringing a contest against such entry, within three months from the date of settlement, preserved all settlement rights, as effectually as could be done by an application to enter. It was said: "A prior settler, who initiates a contest within three months after settlement, and who applies to enter the land within thirty days after receiving notice that he has succeeded in his contest, is in time."

It may be claimed that in the case at bar, the settlement of Mills was made on the 5th of December, 1890, while his affidavit of contest was not filed until the 17th of March, 1891, more than three months thereafter. The land was open to settlement from and after the 29th day of September, 1890, but not to a legal application to enter until February 23, 1891. Had he made settlement as early as he might, he could not have filed an application to enter within three months from that time, nor instituted a contest, as there could then have been no entry to contest. In such a case, I think the rule should be that the application to enter should be made, or the contest initiated, within three months after the land became subject to entry.

The Department has repeatedly passed upon the question as to what acts on the part of the claimant constituted settlement. The recognized rule is that "an act of settlement is complete from the instant the settler goes upon the land with the intention of making it his home, and performs some act indicative of such intent; and such act is sufficient if it tends to disclose a design to appropriate the land in accordance

with law." *Franklin v. Murch* (10 L. D., 582); *Bowman v. Davis* (12 L. D., 415).

The evidence in this case brings Mills within that rule, and his initiation of contest against the entry of Daly, relieved him from the necessity of making application to enter the land, within three months after it became subject thereto, as before his entry could be allowed, that of Daly must be removed.

My conclusion is, that the entry of Daly should be canceled, and that Mills should be allowed to make entry for the land. The decision appealed from is therefore affirmed.

JURISDICTION—NOTICE—MOTION FOR REHEARING.

LONG JIM ET AL. *v.* ROBINSON ET AL.

ON REVIEW.

The Land Department is without jurisdiction to render a judgment affecting the status of an entry, where the entryman has not been made a party to the proceedings in which such judgment is rendered.

A motion for review will be dismissed if not accompanied by affidavit that it is made in good faith and not for the purpose of delay.

A rehearing will not be ordered where the application therefor shows that the proposed additional evidence was within the knowledge of the applicant at the time of the original hearing.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1893.

On the 21st of March, 1893, you transmitted, on the part of Christopher Robinson, Thomas R. Gibson, Julius Larabee, Harrison Williams, Enos B. Peaslee, Charles A. Barron and C. H. Ambercrombie, motion for review of the decision of the Department, of January 6, 1893, in the case of Long Jim and other Indians, against said defendants, and one other (16 L. D., 15), in which it was held that the rights of said Indians to certain lands in the Waterville land district, Washington, were superior to the claims of said white defendants.

On the 10th of April, 1893, you transmitted a further and separate motion for review of said decision, on the part of A. W. La Chappelle, who was also a defendant in said proceedings, and on the 31st of May, 1893, you transmitted a motion for rehearing in said case, on the part of all of said defendants.

Rule 78, of the Rules of Practice, provides that "motions for rehearing and review must be accompanied by an affidavit of the party, or his attorney, that the motion is made in good faith, and not for the purpose of delay."

No such affidavit accompanies the motion for review filed on the part of the defendant La Chapelle, and said motion is for that reason dismissed.

On the 17th of October, 1890, Thomas R. Gibson made homestead entry for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 12, T. 27 N., R. 22 E., in said land district. The several tracts applied for by Long Jim contained 525.30 acres and embraced the W. $\frac{1}{2}$ of said section 12, which included eighty acres of the land covered by the homestead entry of Gibson.

On the 10th of January, 1891, W. F. Allender, who acted as the agent of Long Jim, and R. W. Starr, who then was, and still is, the attorney for all the Indians mentioned in the case, appeared at the local office, and stated that the eighty acres in controversy, covered by the entry of Gibson, was inadvertently included in the land described by Long Jim, and that he made no claim thereto. Allender made and filed an affidavit to that effect, and Gibson was thereupon allowed to commute his homestead to a cash entry.

In your decision in the case, rendered on the 9th of July, 1892, you recited at great length all the facts and circumstances connected with the case, and held that said Indian applicants were entitled to have allotments of lands made to them in severalty in the quantities and manner provided in the agreement of July 7, 1883, and that the right of said several white claimants to the land claimed by them, was subordinate and subject to the prior and superior right of said Indians. You therefore suspended, and held for cancellation, the several homestead entries of said white claimants, in so far as they might include any tract of land which might be allotted by the proper authorities to said Indians.

You concluded your decision by saying: "Thomas R. Gibson's said commuted entry No. 77, is also suspended to await such action as may be deemed just and proper in the premises by such authorities."

Under the circumstances of the case, you had no authority to take such action in reference to the entry of Gibson. It had been allowed upon the statements and affidavit of the attorney and agent of the Indians, that no part of the land covered by his entry was claimed by Long Jim, or either of the other Indians, and his right to the land not being questioned, he was not made a party to the hearing in the case before the local officers. You, therefore, had no jurisdiction to render a judgment affecting his property interests in the land, and that part of your decision wherein you did so, should have been set aside in the departmental decision complained of. It was, however, inadvertently overlooked, and your whole decision was affirmed. I now modify said departmental decision so as to omit from affirmance that part of your decision of July 9, 1892, wherein you suspended the commuted entry of Gibson. That part of your said decision is hereby set aside, and said entry will be allowed to remain intact.

This action is based upon the facts set forth in the affidavit of Gibson, now before me, which are in no way disputed or questioned by the attorney for the Indians, in his answer to the motions for review, or in his reply to the application for rehearing.

Gibson makes oath that on the 25th of January, 1893, he received notice of the decision of the Department in the case; that he never before received *any* notice that he was a party to said contest, in any manner or form, and therefore has never had any chance to defend his rights; that Long Jim does not claim his land, or any interest therein; that it is not topographically or naturally connected with Long Jim's land, being mostly on a high table, two hundred and fifty feet above his claim, which is on the lake shore; that he has held, occupied, cultivated and fenced the land for four years, planted trees, and built a house and out-buildings, and in every respect complied with the law; that when he took the land it had no marks or indications of being claimed by any one, and no one has since claimed any interest in it; that he has never before made entry or filing for government land, and that his entry and all his acts in regard to this tract have been done in good faith; that he is on the best of terms with Long Jim and his brother, both of whom frequently visit him, and take meals at his house.

I have already reviewed the decision complained of, so far as Gibson is concerned, and dismissed the motion for review, of La Chapelle. As to the other defendants, no questions in the case are presented by the motion which were not fully considered and discussed in the decision of which a review is asked. It is claimed that such decision was based upon ex-parte reports of special agents, and other matters outside the record. I do not find this to be the case. Those matters are mentioned in the decision, as circumstances in harmony with the record, but do not form the basis of the conclusion reached. I think the judgment rendered, as to all the defendants served with notice of the hearing, was correct, and the motion for review is accordingly denied.

This leaves for consideration the application for rehearing, which is joined in by all the defendants who had at any time taken part in the case, up to the time of the rendition of the judgment complained of.

This motion was filed on the 8th of April, 1893, and for the purpose of avoiding the objection that it was not filed within thirty days from notice of the decision in the case, it is claimed to be based upon newly discovered evidence. It partakes much more of the character of a motion for review, than for rehearing, and falls very far short of making a case "in accordance with legal principals applicable to motions for new trials at law."

It is not proposed to submit any evidence, in case a rehearing should be ordered, except such as was within the knowledge of the parties at the time of the original hearing. Some evidence on the subject had been introduced, and it is claimed that the additional evidence was withheld, on account of some agreement made with the defendants and Special Agent Litchfield, in which he undertook to adjust the matter satisfactorily to the whites.

Besides charging bad faith on the part of said special agent, the

applicants for a rehearing propose to submit evidence in support of the charge that the Indian claimants are Moses Indians, and only entitled to lands in the Colville reservation. This evidence would be merely cumulative, and evidence of that character will not authorize a rehearing. The motion is denied.

COAL LANDS—DECLARATORY STATEMENT—TRANSFeree.

UNION COAL COMPANY.

No vested rights are secured through filing a coal declaratory statement, and a sale of the land thereafter by the claimant, prior to final proof and entry, defeats his right to purchase said land, and an entry thereof made in his name must be canceled.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1893.

This case is brought to the Department upon an appeal by the Union Coal Company, from your decision of October 1, 1892, in which you declined to reinstate the coal land entry made by Solomon Rothschild, on the 2d of March, 1883, for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 7, T. 15 S., R. 86 W., in the former Leadville, now Gunnison, land district, Colorado.

The entry was made under the provisions of the act of March 3, 1873 (17 Stat., 607) entitled "An act to provide for the sale of the lands of the United States containing coal," and was canceled by you on the 24th of March, 1891, because of the failure of claimant to furnish evidence essential to the validity of the entry.

After the cancellation of said entry, the Union Coal Company made it appear to your satisfaction, that at the time of your call for such additional evidence, the claimant was dead, and further, that said company was the owner of the land covered by Rothschild's entry.

The counsel for said company was then informed that the final affidavit called for by you, might be made by the authorized agent of the present owner supplemented by a duly certified abstract of title, brought down to date.

Such affidavit was duly made by E. S. Brooks, on the 30th of July, 1892, and the abstract of title called for, showed the title to the land in question to be in the Union Coal Company.

Such abstract further showed that on the 4th day of November, 1882, Rothschild conveyed, by quit claim deed, all his right, title and interest in said land, to The Union Pacific Railway Company, with "authority to make purchase of said lands from the United States, in the name of the grantor herein, at the proper land office", etc.

The original affidavit, or declaratory statement of Rothschild, in which he declared his intention to purchase the land in question, under

the provisions of the act of March 3, 1873, bears date November 4, 1882, the same day on which his deed was executed. In that affidavit he stated that he came into possession of the land on the 6th of June, 1882, and that it was of the character contemplated in the act of March 3, 1873.

The final affidavit, upon which the final certificate and receipt were issued, was made by Robert M. McDowell, who described himself as the duly authorized agent of said Rothschild. His affidavit was sworn to before the register, on the 2d of March, 1883, and in it he described the character of the land, and the character and value of Rothschild's improvements thereon. He also made oath that Rothschild made entry for the land for his own use and benefit, and not directly or indirectly for the use and benefit of any other person.

This affidavit not being satisfactory to you, additional evidence was called for, and not being furnished, the entry was canceled, as already stated. When the abstract of title showed that Rothschild had sold and conveyed all his right, title and interest in the land, four months before entry therefor was made in his name, and also in his absence, you refused to reinstate said entry, holding that such entry was not made for his own use and benefit, but for the use and benefit of the Union Pacific Railway Company, or its grantee, the Union Coal Company.

In the appeal before me, it is alleged that you erred in holding and deciding that Rothschild had not, prior to his sale of the land to the Union Pacific Railway Company, the grantor of the Union Coal Company acquired any vested right in the premises; in holding and deciding that, at the time of the entry, Rothschild had no right to make the same, and in refusing to reinstate said entry.

Vested rights are rights which are *fixed*, and not in a state of contingency or suspension. I am unable to understand what *vested* rights Rothschild had in the land in question on the 4th of November, 1882, the date of his deed to the Railway Company. He had that day declared his intention to purchase the land, and whatever rights he had were contingent upon his compliance with law, in the matter of expending money in working and improving the mines, and in paying for the land.

Having parted with all his interest in the land on the 4th of November, 1882, he could not make proof upon which an entry could properly be made, on the 2d of March, 1883. Such entry was, therefore, improperly allowed, and properly canceled, and you did not err in refusing to reinstate it. The decision appealed from is affirmed.

UNION COLONY v. FULMELE ET AL.

Motion for review of departmental decision of March 10, 1893, 16 L. D., 273, denied by Secretary Smith September 23, 1893.

RAILROAD LANDS-SECTION 3, ACT OF MARCH 3, 1887.

BENNER v. RAMSBY.

The rights of the persons for whom relief is provided in section 3, act of March 3, 1887, and classified therein, must be considered in the order stated in said section.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1893.

I have considered the case arising upon the appeal by George Benner from your decision of December 26, 1891, holding that Ephraim B. Ramsby has a superior right to enter the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 27, T. 4 S., R. 2 E., Oregon City land district, Oregon.

This tract is within the limits of the grant under the act of July 25, 1866 (14 Stat., 239), to aid in the construction of the Oregon and California Railroad Company, and opposite the definite location of said road shown upon the map filed January 29, 1870.

Both at the date of the act making this grant and the date of definite location, the land in question was embraced in homestead entry No. 383, made by Alfred James on November 6, 1865, and canceled August 18, 1871.

Your decision held, therefore, that this land was excepted from the grant, and from that decision no appeal was filed by the company.

It appears, however, that on September 5, 1871, Ephraim B. Ramsby made homestead entry No. 1911, for the land in question, in connection with adjoining land in section 28, same town and range.

On January 25, 1875, Ramsby made final proof, and in support thereof made affidavit that Alfred James abandoned the land and changed his residence therefrom prior to the year 1868, and never afterwards resided upon or cultivated the same.

This proof was considered in your office letter of March 22, 1875, and it was held that as the entry had been abandoned by James prior to the definite location of the road, the land had inured under the grant and that his proof and entry could stand only to the land in the even numbered section. In accordance with this decision final certificate No. 356 issued upon Ramsby's entry, on April 13, 1875, as to the land in section 28, and the same has since been patented.

It is apparent that Ramsby's entry was erroneously canceled as to the land in section 27, being the tract in question, for conflict with the grant.

The 3d section of the act of March 3, 1887 (24 Stat., 556), provides for the reinstatement of certain entries erroneously canceled on account of railroad grants, and, if Ramsby has any right under said section, he must present an application and make showing as required by said act and the instructions thereunder, contained in circular letter "F" of February 13, 1889.

Benner's claim rests upon an application to make homestead entry of this land, presented and rejected by the local officers on November 4, 1890, on account of the decision made by your office, March 22, 1875, holding that this land had passed under the grant.

Section 3 of the act of March 3, 1887 (*supra*) provides:

That, if in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any *bona fide* settler has been erroneously canceled on account of any railroad grant, or the withdrawal of public lands from market, such settler, upon application, shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: *Provided*, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry: *And provided further*, That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to *bona fide* purchasers of said unclaimed land, if any, and if there be no such purchasers, then to *bona fide* settlers residing thereon.

Three classes of persons are provided for under this section and in the order named:

First. *Bona fide* settlers whose homestead or pre-emption entries have been erroneously canceled on account of a railroad grant or withdrawal.

Second. *Bona fide* purchasers of such unclaimed lands.

Third. *Bona fide* settlers residing thereon.

This section was construed by the Attorney General in his opinion of November 17, 1887 (6 L.D., 272), and therein it is held:

The rights of the several classes to the lands referred to in the section are successive in the order stated in the section. The first in right is the homestead or pre-emption settler whose entry has been wrongfully canceled. If he elects to assert his right, and has not been disqualified by locating another claim or making another entry in lieu of the entry erroneously canceled, his right is absolute, and the successive rights of the remaining two classes can not attach if he lawfully asserts his claim. If he fail to claim the land, or is disqualified under the act, the second class of persons, who are the *bona fide* purchasers of the land unclaimed by him, attach, and have precedence over the third class. The *bona fide* purchasers here referred to are those who, without knowledge of wrong or error, have purchased from the railroad company lands which have been previously entered by a pre-emption or homestead settler, whose entry has been erroneously canceled, as described in the first clause of the third section, and which land the pre-emption or homestead settler did not elect to claim after the recovery by the proceedings prescribed by the second section of the act.

Under this Ramsby should be allowed a reasonable time within which to make application for reinstatement, and should he apply, his

rights will then be determined upon the showing made, and, if he fails, Benner's application might then be admitted upon his showing that there is no other person of the classes provided for entitled to a prior right of entry.

Your decision, with the above modification, is affirmed.

GIBBS v. KENNY.

Motion for review of departmental decision of January 6, 1893, 16 L. D., 22, denied by Secretary Smith, September 23, 1893.

PATENT—SURVEY—SWAMP LAND—PALATKA SCRIP.

STATE OF FLORIDA.

A patent for all of a fractional section conveys only such land as may be then included within the approved township plat of survey.

A special swamp indemnity certificate, issued to the State of Florida under the act of June 9, 1880, is not locatable upon lands within the corporate limits of a city.

Secretary Smith to the Commissioner of the General Land Office, September 23, 1893.

The question involved in this appeal is as to the right of the State of Florida to make selection of lot 3, square 28, and lot 3, square 21, in the city of St. Augustine, being part of section 17, township 7 south, range 30 east, Gainesville, Florida, under special certificate issued to said State as indemnity for swamp and overflowed lands, under the provisions of the act of Congress of June 9, 1880, (21 Stat., 171).

Said act confirmed certain entries and warrant locations within the limits of the former Palatka military reservation, in Florida, where said entries conflicted with selections made by the State of Florida, under the swamp land grant, upon the State filing with the Commissioner of the General Land Office its relinquishment of all claim thereto, and the State shall thereupon be entitled to select in lieu thereof an equal quantity of land from any of the vacant, unappropriated public lands of the United States in Florida, and patents shall be issued to the State for the lands so selected in lieu of the tracts taken by the settlers.

The local officers rejected the application of the State to select the tracts in controversy under said indemnity certificate, and you affirmed said decision, for the reason that the State had selected under the swamp grant said entire fractional section 17, which was described in the approved list as fractional section 17, containing an area of 286.28 acres, and was patented to the State on September 18, 1856, by the same description, and which appeared from said description to include the land in controversy. You rejected it also, for the further reason that the lands were embraced in a military reservation, until October

15, 1883, when they were relinquished by the War Department, and placed under the control of the General Land Office, under the act of August 18, 1856 (11 Stat., 87), and that said lands are now subject only to disposal under the act of July 5, 1884 (23 Stat., 103).

From this decision the State has appealed, alleging error in holding that the lands applied for are included in the patent to the State of September 18, 1856, and in holding that they must be disposed of under the act of July 5, 1884.

It is alleged by the State that, neither at the date of the selection nor of the patent to the State were the lands in controversy surveyed and platted as a part of fractional section 17, nor have they ever been surveyed or platted as a part of said section.

The township plat of survey was approved March 6, 1851, and shows fractional section 17 to be on the east shore of the Matanzas river, opposite St. Augustine, surrounded by navigable water, and subdivided into lots 1, 2, 3, and 4, aggregating 286.28 acres, and the land in controversy was not then surveyed and platted as a part of said fractional section. Although by protracting the lines of survey across the land in controversy it might appear that it would be embraced in said section 17, yet a patent to land, made in 1856, to all of said fractional section 17 would only convey such land as was shown by the approved township plat of survey to be embraced in said fractional township as surveyed. As the township plat of survey, approved March 6, 1851, shows that the said fractional township only embraced lots 1, 2, 3, and 4, aggregating 286.28 acres, and did not embrace the land in controversy, the patent to the State, describing the land as the whole of fractional township 17, conveyed only the 286.28 acres embraced in lots 1, 2, 3, and 4, as shown by said survey. Besides, the lands in controversy were at the date of said patent embraced in a military reservation, and so continued until October 15, 1883, when they were placed under the control of the General Land Office, under the act of August 18, 1856 (*supra*).

You were therefore in error in holding that said land was embraced in the patent issued to the State, September 18, 1856.

In support of the second ground of error, it is contended by the State that the lands in controversy, which were within a military reservation up to October 15, 1883, were on that day relinquished and placed under control of the Land Department, under the act of August 18, 1856, which provides as follows:

That all public lands heretofore reserved for military purposes in the State of Florida, which said lands in the opinion of the Secretary of War, are no longer useful or desired for such purposes, or so much thereof as said Secretary may designate, shall be and are hereby placed under the control of the General Land Office to be disposed of and sold in the same manner and under the same regulations as other public lands of the United States: *Provided*, That said lands shall not be placed under the control of said General Land Office until said opinion of the Secretary of War, giving his consent, communicated to the Secretary of the Interior in writing shall be filed and recorded.

It is contended that the land embraced in this reservation having been turned over to the land department, on October 15, 1883, in accordance with the provisions of said act, it thereupon immediately became "vacant and unappropriated public lands of the United States in Florida," subject to disposal as other public lands, and did not come under the operation of the act of July 5, 1884.

The Department, in the case of Daniel Mather (5 L. D. 632), held that the act of July 5, 1884, governs the disposal of all lands in abandoned military reservations that had not been disposed of prior to the passage of said act, although relinquished prior thereto, which decision was in force when the State applied to locate the lands. This ruling was reaffirmed in the case of Mather *et al. v. Hackley's heirs* (15 L. D. 487), but a motion for review of said decision is now pending. It is, however, unnecessary to invoke the ruling of the Department in the case of Mather in support of your decision, for the reason that the words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws, and do not necessarily embrace all unoccupied and unappropriated public lands, the title to which may be in the United States. *Newhall v. Sanger*, 92 U. S., 761; *Frank Burns*, 10 L. D., 365; *Bardon v. Northern Pacific R. R. Co.*, 145, U. S., 538.

These lands being within the corporate limits of the city of St. Augustine, were not subject to disposal under the general laws, nor to location with Valentine scrip, which may be located on any unoccupied and unappropriated public lands of the United States, whether surveyed, or unsurveyed, nor with Porterfield scrip, which can be located on any unappropriated public land of the United States, whether surveyed or unsurveyed, when the minimum price does not exceed one dollar and twenty-five cents per acre.

The provisions of the act authorizing the issuance of scrip to Valentine or his legal representatives, and to the executors of Porterfield, were as liberal as to the character of land which could be located with said scrip as the act of June 9, 1880, authorizing the State of Florida to select an equal quantity of the unappropriated public lands of the United States, in Florida, in lieu of certain entries and warrant locations of swamp lands made within the limits of the Palatka military reservation, which were confirmed by said act.

As lands within the corporate limits of a city or town are not subject to location with either Porterfield or Valentine scrip, I can see no reason why such lands should be subject to location with the indemnity scrip issued to the State of Florida for swamp and overflowed lands within the former Palatka military reservation. *Townsite of Seattle v. Valentine*, 6 C. L. O., 135; *Merrifield v. Illinois Central Railroad Company*, 9 C. L. O., 219; *Thomas B. Valentine et al.*, 5 L. D., 382.

This is a sufficient reason for rejecting the application of the State of Florida, and your decision is therefore affirmed.

THOMAS v. THOMASSON.

Motion for review of departmental decision of January 17, 1893, 16 L. D., 52, and for rehearing, denied by Secretary Smith, September 23, 1893.

TIMBER CULTURE ENTRY—LAND IN TWO SECTIONS.

JESSE E. COX.

A timber culture entry, commuted under section 1, act of March 3, 1891, and embracing land in two sections, may be allowed to stand in view of the fact that there is no express provision of law prohibiting such an entry, and that the rights of no other entryman can be affected thereby.

First Assistant Secretary Sims to the Commissioner of the General Land Office, September 28, 1893.

On the 9th of July, 1891, Jesse E. Cox made proof and payment, under the provisions of section one of the act of March 3, 1891, (26 Stat., 1095) upon a timber culture entry made by him on the 14th of May, 1886.

The certificate issued to him, by the register of the land office at Waterville, Washington, stated that upon the presentation of the same to the Commissioner of the General Land Office, he would be entitled to receive a patent for the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 21, and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 20, T. 27 N., R. 30 E., W. P. M., in said land district. The tract contained one hundred and sixty acres, and the amount paid by him was two hundred dollars.

On April 1, 1892, your office addressed a letter to the local officers at Waterville, in which, after describing the entry and the land covered thereby, it is stated that Cox had been allowed to make entry for land in two sections, "clearly through the fault of the local office." The letter concluded by saying:

You will call upon Mr. Cox to relinquish the eighty-acre tract, upon which the principal improvements are not located. He is allowed sixty days to do this, or appeal, and should he not take proper action his entry and the cash certificate will be canceled. So advise him.

He did not relinquish any portion of the land embraced in his entry, but brought the case to the Department by appealing from your judgment.

It is urged there was error in holding that a timber culture entry could not be made upon parts of two sections, provided the same did not exceed one hundred and sixty acres, and formed a compact body of land.

It is shown that no other timber culture entry has been made in either of said sections, and that Cox fully complied with the requirements of the timber culture law for a period of four years, and that he

was an actual resident of the State in which the land was located, and had fenced and placed under cultivation the entire tract, except about five acres.

It is also shown that the same land had been covered by a prior timber culture entry, made by Robert B. Roberts, on the 20th of April, 1883, who relinquished the same prior to the entry of Cox. The first entry was made at the North Yakima land office, and it is insisted that a timber culture entry for the land having been allowed by the local officers in two land districts, and not objected to by your office when the local officers made their report, that the entryman should not, at this late day, be deprived of his property rights, through no fault of his.

In the case of *Anderson v. Potter* (15 L. D., 79), it was held that "a timber culture entry embracing land in different sections may be allowed to stand, where made prior to the act of June 14, 1878." This would seem to imply that an entry of that character could not be allowed to stand, if made after the passage of that act. I do not find that the act of June 14, 1878 (20 Stat., 113), anywhere in express terms forbids the taking of a timber culture claim in two sections. It provides who may make timber culture entries, restricts the quantity of land to be included in an entry to one hundred and sixty acres, allows the land taken to be portions of contiguous subdivisions, provided the entry forms a compact body of land. It further provides "that not more than one-quarter of any section shall be thus granted, and that no person shall make more than one entry under the provisions of this act."

The second section of said act states what the affidavit of the person applying for the benefit thereof shall contain. It must show his qualifications to make the entry; that the section of land specified in his application is composed exclusively of prairie, or other lands devoid of timber; that the entry is made for the cultivation of timber, and for his own exclusive use and benefit; that he makes his application in good faith, and not for the purpose of speculation, nor directly nor indirectly for the use or benefit of any other person or persons whomsoever; that he intends to hold and cultivate the land, and to fully comply with the provisions of the law, and that he has not heretofore made an entry under said timber culture act or any act of which said act of 1878 is amendatory.

Said act finally provided that all parties who had made entries under the prior timber culture laws, should be permitted to complete them under that act, and repealed all acts and parts of acts in conflict therewith.

This repeal of all prior timber culture laws, put an end to second entries by the same party, which was allowed by the act in force up to the time of the passage of the act of 1878. In the case of an entry made under the act of March 13, 1874 (18 Stat., 21), it was held in *Ingalls v. Lewton* (13 L. D., 509), that a second entry of land might be made, not only in a different section, but in a different township, where the two

entries taken together did not exceed one hundred and sixty acres, and the first entry was for less than forty acres.

No regulations of the Department are more specific in limiting a timber culture entry to land in one section, than the acts of Congress making provisions for such entries. Consequently, there are no regulations which in express terms prohibit an entry from embracing land in two or more sections. The only reported case in which I find that the Department has passed upon the question, except that of *Anderson v. Potter*, already mentioned, in which an entry embracing land in two sections was allowed to stand, was that of *James C. McLafferty et al.* (11 C. L. O., 54). In that case, Acting Secretary Joslyn, in a decision of half a dozen lines, affirmed the decision of your office, which rejected the applications mentioned, on the ground that they each embraced land in two sections. The only reason given by Mr. Joslyn for affirming your decision was that "such have been the uniform rulings." No rulings are cited in support of the decision, nor do I find any reported case prior to that, wherein similar views are expressed.

In the case of *William A. Cox* (3 L. D., 361), Commissioner McFarland rejected his application "because it embraced portions of different sections, which is not admissible under the rules of this office." The Commissioner does not say that such application is contrary to law, or to the regulations of the Department, neither does he cite any rule of his office which prohibits an entry embracing land in more than one section.

The three cases of *McLafferty, et al.*, *William A. Cox*, and *Anderson v. Potter*, are the only reported cases in which I find the question involved in the case before me, has been passed upon by your office, or by the Department. The question was thoroughly considered in the last mentioned case, and the entry allowed to stand, notwithstanding it embraced land in two sections. That entry was made under the act of March 13, 1874, but the provisions of that act, and of the one under which the present entry was made, are almost precisely similar as to the land which may and may not be entered under them respectively. Both acts provide that no party shall make entry for more than one hundred and sixty acres, and that not more than one quarter of any section shall be granted under said acts.

In the case at bar the entry embraces only one hundred and sixty acres, and the land composing it forms a compact body, although made up of portions of contiguous subdivisions of sections. In these respects it is in strict compliance with the law under which it was made. That law was repealed by the act of March 3, 1891, and no further timber culture entries can be made. Those made prior to the passage of said repealing act might be completed, the same as if said act had not been passed, and any person who had made entry and complied with the former laws for four years, might make final proof, and acquire title to

the land by the payment of one dollar and twenty-five cents per acre for such tract. This course was pursued by the entryman in this case.

It is shown that his entry is the only one of that character in sections twenty and twenty-one, and the timber culture law being repealed, no rights of other would-be entrymen are interfered with by his entry. It is also shown that he has fenced and cultivated the entire tract, with the exception of five acres, having been in undisputed possession of the land, under his entry, since 1886.

Roberts was allowed to make timber culture entry for the tract in 1883, without objection from the local officers, and his entry was allowed to stand, when reported to your office. In 1886 Cox purchased the relinquishment of Roberts, and made entry for the tract, without objection from the local officers of the district in which the land was then situated, and his entry was allowed to stand, when reported to your office. In 1891, he made his commutation proof and payment, in accordance with the act of March 3, of that year, and received final certificate and receipt. When that fact was reported to your office, for the first time objection was made to this entry, because it embraced land in two sections, and required him to relinquish one half of his land.

Were this a case between individuals, a court of equity would apply the rule of estoppel, and your office would not be permitted to raise the objection here made, after allowing the land to be occupied and improved all those years under the timber culture law, with full knowledge of all the facts, and without an intimation that the entry and occupation were not legal.

Under all the circumstances of the case, and in view of the fact that there are no express provisions of law, or regulations of the Department, restricting a timber culture entry to one section; and of the further fact that there can be no further timber culture entries, and the rights of no other entryman can be affected by the allowance of this, my conclusion is that patent should issue to Cox for the land described in his entry and final certificate.

In reaching this conclusion, I violate no express provisions of law, nor overrule any well considered decision of the Department. On the contrary, it is in accord with the decision in the case of *Anderson v. Potter* (15 L. D., 79). The decision appealed from is accordingly reversed.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

JOHN MALONE ET AL.

An order of the General Land Office, made prior to the expiration of two years from date of final certificate, requiring the entryman to relinquish one of the tracts covered by his entry, so that said entry shall approximate one hundred and sixty acres, defeats confirmation under the proviso to section 7, act of March 3, 1891, though the notice of such requirement was not given until after the expiration of said two years.

First Assistant Secretary Sims to the Commissioner of the General Land Office, September 30, 1893.

I have considered the appeal of John Malone, transferee of Philip L. Jones, from your decision of April 18, 1892, requiring him to relinquish one of the legal subdivisions of pre-emption cash entry No. 9,734 of the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and lots 1 and 2, Sec. 35, T. 19 N., R. 1 W., made by Philip L. Jones on August 6, 1889, at the Humboldt land office in the State of California.

The record shows that on July 28, 1891, within two years from the date of said entry, you considered the same, and advised the local officers "that as tract involves subdivisions in different quarter sections, claimant will be required to relinquish one of such subdivisions to approximate as nearly as may be one hundred and sixty acres, and leave the remainder of the entry contiguous," citing J. B. Burns (7 L. D., 20). You also directed the local officers to "notify him to make such relinquishment" and promptly submit the same to you.

On November 16, same year, the local officers advised you that said Malone, transferee, was furnished a copy of your said letter, and had not yet responded thereto.

On December 19, 1891, you again directed the local officers to notify said Malone

"that he must relinquish one of the above subdivisions, so that the remaining portion will approximate as nearly as possible one hundred and sixty acres, the remaining tract to be compact in form and contain that portion of the land on which the improvements were placed."

On January 16, 1892, the local officers forwarded certain affidavits of transferee, in one of which it was alleged that he could not "relinquish any portion of the said lands without serious injury to himself," and at the same time the local officers submitted a statement of the attorney of Malone claiming that you had no legal authority to cancel said entry.

On February 8, 1892, you reaffirmed your said rulings, and held "that the transferee must either comply therewith or exercise his right of appeal," and in default of action by him the entry would be canceled.

In his appeal, said Malone alleges that you have no jurisdiction to hold

an entry for cancellation after the issuance of final receipt, and that the transferee should not be held responsible for the carelessness of the local officers in issuing a final receipt, and thereby enabling the entryman to sell said land to an innocent purchaser.

In a supplemental brief the transferee alleges that the local office sent a letter to the entryman on August 7, 1891, one day after the expiration of two years from the issuance of final certificate; that the transferee was notified on October, 23, 1891, and asking that said entry be confirmed under the proviso of section 7 of the act of March 3, 1891 (26 Stat., 1095).

The allegations of appellant cannot be sustained.

The final certificate was erroneously issued, and under the ruling cited by your office, the entryman and transferee were properly required to relinquish one of the legal subdivisions, so as to approximate the entry to one hundred and sixty acres.

It appears that the alleged transfer was made subsequent to March 1, 1888, and hence does not come within the provisions of the body of said section 7. Nor can relief be given under said proviso, for the reason among others that your order requiring the entryman to relinquish was made prior to the expiration of two years from the date of the issuance of final certificate, and, although the order was not sent by the local officers until one day after the expiration of two years from the date of final receipt, the notice to the transferee being served still later, yet the action of your office requiring said entryman to make said relinquishment was a "proceeding" that takes the case out of the provisions of said proviso.

In the departmental instructions dated July 1, 1891 (13 L. D., 1-3), it is said—

You will therefore approve for patent all entries against which no proceedings were begun within the period of two years from the date of the final certificate, but where proceeding have been, or shall be, begun within the specified period, the entry will be held to have been taken out of the operation of this statute, and such cases will proceed to final judgment as before.

The word "proceedings," as used herein and in the circular of May 8, 1891 (12 L. D., 450), will be construed as including any action, order or judgment had or made in your office canceling an entry, holding it for cancellation, or which requires something more to be done by the entrymen to duly complete and perfect his entry, and without which the entry would necessarily be canceled.

In *Bulman v. Meagher* (id., 94), it is held that—

An order of the General Land Office, made within two years after the issuance of final receipt, requiring a locator of scrip to show his right of possession thereto, is such a proceeding as will except the entry from the confirmatory operation of the proviso to section 7, act of March 3, 1891.

In the case of *Jennie Routh* (id., 332), it is held that—

An order of the General Land Office holding an entry for cancellation prior to the expiration of two years from the issuance of final certificate, defeats the confirmation of said entry under the proviso to section 7, act of March 3, 1891.

That you have authority to hold for cancellation an illegal entry after the issuance of final receipt, is too well settled by the uniform rulings of this Department, and the repeated decisions of the courts, to be seriously questioned at the present time. *Traveler's Insurance Co.* (9 L. D., 316); *Smith v. Custer et al.* (8 L. D., 269); *United States v. Montgomery* (11 L. D., 484); *Harkness v. Underhill* (1 Black, 316); *Witherspoon v. Duncan* (4 Wall., 210); *Lee v. Johnson* (116 U. S., 48); *Knight v. U. S. Land Association* (142 U. S., 161, 181).

The entry having been made for a larger amount of land than is authorized by law, there was no error in your judgments requiring the relinquishment of one of said legal subdivisions, so as to approximate the entry as near as possible to one hundred and sixty acres; and said entry can not be confirmed under said proviso, because your judgment of July 28, 1891, operated as a bar to such confirmation.

The excess in this case is eighteen acres. Now, if the entryman is required to relinquish one of the forty acre subdivisions, it will make the deficit twenty-two acres, four acres in excess of the present surplus.

It is not shown in his affidavit upon what part of his claimed entry his improvements are located. A knowledge of this fact, it seems to me, would aid you greatly in arriving at an equitable conclusion in the premises. If it should appear that his improvements are valuable and extend over both of these lots, so that it would work greater injury to the entryman to release either of them than to lose one of the forty acre subdivisions, the entry might be allowed to stand intact, under the rule in the case of *Joseph C. Herrick*, 14 L. D. 222.

You will therefore require the entryman to furnish you satisfactory proof as to the character, value, and location of his improvements, and on receipt of such proof you will readjudicate the case, in the light of the additional evidence.

RESERVOIR LANDS—SETTLEMENT—ACT OF JUNE 20, 1890.

DEREG *v.* McDONALD.

One who enters upon the reservoir lands restored to the public domain by act of June 20, 1890, prior to the time fixed therefor, and remains thereon until said lands are subject to settlement, is disqualified as a settler under said act.

First Assistant Secretary Sims to the Commissioner of the General Land Office, September 30, 1893.

This case involves the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, sec. 36, T. 36 N., R. 5 E., Wausau land district, Wisconsin.

The record shows that John H. McDonald made homestead entry December 20, 1890.

After due notice given, this case came up for trial before the register and receiver on April 10, 1891, upon the application of Dereg, who

claimed the land by reason of prior settlement. On July 6, 1891, they rendered their decision holding for cancellation the homestead entry of McDonald and also holding that Dereg had the prior claim.

Upon appeal by the defendant, your decision of May 31, 1892, was rendered, where, in effect, the opinion below was sustained. The case is now, upon proper appeal, here for consideration.

The first ground of error alleged is: "In holding that said Owen Dereg is qualified to enter said lands." It is in evidence and admitted, that Dereg, in company with others, slept in a shanty situated on the water reserve lands the night of December 19, 1890, arriving there at 9 p. m., and that the next morning (December 20,) he settled upon the land in controversy, between eight and nine o'clock, the shanty he had slept in being upon the land he selected as a homestead entry.

The land thus entered upon was returned to the public domain and opened for settlement, by the act of Congress of June 20, 1890 (26 Stat., 169). Section three thereof is as follows:

That no rights of any kind shall attach by reason of settlement or squatting upon any of the lands hereinbefore described before the day on which such lands shall be subject to homestead entry at the several land offices, and until said lands are opened for settlement no person shall enter upon and occupy the same, and any person violating this provision shall never be permitted to enter any of said lands or acquire any title thereto. This act shall take effect six months after its approval by the President of the United States.

The question raised by the case is: Was such entry upon the part of Dereg of such a nature as to disqualify him from making entry upon the land in question?

It is urged in his behalf that he innocently went upon the land (without knowing that he was within its boundaries) in order to secure the protection from the weather afforded by the hut.

In the recent case of *Smith v. Townsend* (148 U. S., 490), the question was passed upon in reference to the public domain in Oklahoma. The syllabus of that case is:

An employe of the Atchison, Topeka and Santa Fe railroad, residing within the territory of Oklahoma before, up to and on the 22d day of April, 1889, was thereby disabled from making a homestead entry upon the tract of land upon which he was residing.

That case turned upon the construction to be given to the acts of March first and second, 1889, and the proclamation of the President of March 23, 1889. The second section of the act of March 1, 1889 (25 Stat., 757-759), is as follows:

That the lands acquired by the United States under said agreement shall be a part of the public domain, but they shall only be disposed of in accordance with the laws regulating homestead entries, and to persons qualified to make such homestead entries, not exceeding one hundred and sixty acres to one qualified claimant. And the provisions of section twenty-three hundred and one of the Revised Statutes of the United States shall not apply to any lands acquired under said agreement. Any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are opened to settlement by act of Congress shall not be permitted to occupy or to make entry of such lands or lay any claim thereto.

And the proclamation of the President of March 23, 1889, added—

Warning is hereby again expressly given, that no person entering upon and occupying said lands before said hour of twelve o'clock, noon, of the twenty-second day of April, A. D., eighteen hundred and eighty-nine, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto; and that the officers of the United States will be required to strictly enforce the provision of the act of Congress to the above effect.

Under these acts and the proclamation, the supreme court held that Smith was disqualified from making entry, and Mr. Justice Brewer, in delivering the opinion of the court, says: "It is enough now to hold that one who was within the territorial limits at the hour of noon of April 22, was within both the letter and the spirit of the statute disqualified to make a homestead therein." The inhibition contained in the third section of the act opening the water reserve lands to settlement, is as strong as those under which the above case was determined, and the doctrine there laid down is as binding upon the case now at issue, as one involving lands in Oklahoma.

The section of the act referred to was intended legally to place a wall around the land until the day of opening came, and he who purposely was within it at the day of opening, became thereby forever disabled from making entry therein.

It thus follows that the decision appealed from was in error, and the same is hereby reversed. The entry of McDonald will be allowed to remain, and the contest of Dereg will be dismissed.

FINAL PROOF—CERTIFICATE—ALIENATION—FINAL AFFIDAVIT.

GIBBS *v.* BUMP ET AL.

The sale of land after final proof, but prior to the issuance of final certificate, will not defeat the right to a patent, where the record shows due compliance with law.

A final affidavit returned for correction, and again filed when corrected, takes effect as of the date when first received, where, in the meantime, the fees and purchase money are retained by the local office.

First Assistant Secretary Sims to the Commissioner of the General Land Office, September 30, 1893.

On the 10th of June, 1880, Elijah Bump made homestead entry for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 10, and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 9, T. 2 N., R. 35 W., North Platte series, now McCook land district, Nebraska. On the 19th of December, 1883, he made cash entry for said land, under the second section of the act of June 15, 1880, (21 Stat., 237).

On the 24th of October, 1889, your office ordered a hearing on the application of Grant Lines to contest said entry, on the ground that Bump had sold the land prior to the date of his cash entry. Such con-

test was dismissed on the 26th of February, 1890, for want of prosecution. In making their report in the Lines case, the local officers transmitted to your office an affidavit of contest against said entry, executed by Allison D. Gibbs, on the 20th of February, 1890, and filed in their office while the Lines contest was still pending. He alleged that the cash entry of Bump was illegal in inception; that prior to the date of said entry he had sold and conveyed to Rebecca H. Stratton all his right, title and interest in said land, his deed of conveyance having been made on the 17th of December, 1883, which was two days prior to the date of his final receipt. He asked for a hearing in the case, which was ordered by you on the 5th of May, 1890.

Such hearing took place on the 20th of August, 1890, and was attended by the contestant, and by Mrs. Stratton, the transferee, and on the 28th of that month, the local officers rendered a decision, holding the entry for cancellation. The decision of the local officers was reversed by your office on the 9th of May, 1892, and an appeal from said decision brings the case to the Department.

From the record in the case, it appears that by deed, dated December 17, 1883, Bump sold and conveyed all his right, title and interest in the land to Rebecca H. Stratton, for the sum of two hundred and fifty dollars, and that up to the 15th of April, 1892, she was the owner thereof.

It further appears that prior to the 17th of December, 1883, an agent for Mrs. Stratton entered into negotiations with Bump for the purchase of said land, and that on the 12th of that month, he made his final proof required by said act, and sent such proof, together with the purchase money, and fees, to the local office. The local officers informed the person who presented such proof and money, that the proof should have been sworn to before the clerk of the court, instead of a notary public. The money was retained, but the proof was returned for correction. The corrected proof was executed on the 17th of December, 1883, and returned to the local office, where it was received and accepted on the 19th of that month, on which day final receipt and certificate were issued. So far as appears, the only difference between the proof made on the 12th of December, 1883, and that made on the 17th of that month, was in the name of the officer before whom it was sworn to.

Under these circumstances, the contestant claims that Bump had no right to purchase the land under the second section of the act of June 15, 1880, and in support of that position, cites the case of *Andas v. Williams* (9 L. D., 311), which held that while the right to purchase under that section was not defeated by a prior contract of sale, such right was lost by an actual sale or disposition of the land.

The Department has uniformly held that the sale of land after final proof, but prior to the issuance of final certificate, will not defeat the right to a patent, where the record shows due compliance with law. *Magala Gold Mining Company v. Ferguson* (6 L. D., 218); *Orr v.*

Breach (7 L. D., 292); *Eberhard v. Querbach* (10 L. D., 142). In the case of *Charles Lehman* (8 L. D., 486), it was held that when a person has in fact complied with the law up to the time of making proof, and can, at that time, truthfully make the requisite final affidavit, a sale thereafter, without such affidavit having been made, and prior to the issuance of final certificate, will not of necessity defeat the right to a patent.

I think the cases cited cover that of Bump. He had complied with the law up to the 12th of December, 1883, and could on that day truthfully have made the requisite final affidavit. He did in fact make such affidavit on that day. Two days later it was presented to the local officers, together with the money to purchase the land, and their fees. They required the affidavit to be sworn to before another officer. This was done on the 17th of December, 1883, and returned to the local officers, who accepted the proof. Five days after making his final proof, showing full compliance with law, he sold the land to Mrs. Stratton, and conveyed the same to her by deed, bearing date two days prior to the date of his final certificate and receipt.

In the case of *Gilbert v. Spearing* (4 L. D., 463), it was held that the right of entry is complete, and in contemplation of law, the land is entered from the moment when the application, affidavit, and legal fees are placed in the hands of the local officers, if the land is properly subject to such appropriation.

In the case at bar, the land was properly subject to the appropriation sought to be made, and the affidavit and legal fees were placed in the hands of the local officers on the 14th of December, 1883. The fees and purchase money were retained by the local officers, but the affidavit was returned for correction, in the signature of the officer taking it. In *Banks v. Smith* (2 L. D., 44), it was held that an application erroneous in form, returned for correction, should take effect from the date when first received at the local land office.

The affidavit of Bump was not erroneous in form, but was sworn to before a notary public, instead of the clerk of the court. It was first received at the local land office on the 14th of December, 1883. It was returned for correction, and again promptly sent to the local office. According to the ruling in the case last cited, it should take effect from the date when first received, which was prior to the sale and conveyance of the land by Bump to Stratton.

I find no violation of law, or evidence of bad faith, on the part of either Bump or Mrs. Stratton. If there is any bad faith in the case, it would seem to be on the part of the contestant, who allowed Mrs. Stratton to improve, and pay the taxes on the land for six years after her purchase, and then sought to take it from her, for no fault of hers, or failure on her part to comply with the law. The decision appealed from is affirmed.

PRACTICE—AMICUS CURIE—SETTLEMENT RIGHTS.

NEWELL *v.* HUSSEY (ON REVIEW).

A brief, with due service of copies, may be properly filed by an attorney, appearing as *amicus curie*, for the purpose of presenting views on questions to be decided in a case that will affect the interests of his clients in matters pending before the Land Department.

Settlers who, without authority of law, enter upon lands that are held in reservation under departmental instructions that expressly forbid all settlers from entering thereon, until lawful permission is given, acquire no equities thereby.

Secretary Smith to the Commissioner of the General Land Office, October 4, 1893.

I have considered the motion for review filed by counsel for Hussey of departmental decision in the case of Fred S. Newell *v.* John J. Hussey (16 L. D., 302), wherein the decision of your office holding the homestead applications of said parties for the SE. $\frac{1}{4}$ of Sec. 17, T. 49 N., R. 7 W., Ashland, Wisconsin, land district, were simultaneous, and directing that the land be disposed of to the highest bidder under the rules governing such applications, was affirmed.

The land in controversy is situated within the limits of the withdrawal made for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railroad Company under the acts of Congress approved June 3, 1856 (11 Stat., 20), and May 5, 1864 (13 Stat., 66). Said land was on October 22, 1891, ordered restored and opened for settlement and entry on November 2, 1891, and on the last named day the applications of both Newell and Hussey alleging settlement thereon prior to the time said tract became subject to entry, were received through the mail at the local office before 9 o'clock in the forenoon. The register and receiver decided their applications to be simultaneously received, and ordered a hearing to determine the rights of the parties, and as a result decided in favor of Newell and recommended that his application be allowed. Hussey appealed, and your office decided

that these claimants are not entitled to any benefits by reason of their settlements on the land prior to its formal opening, and as their applications were simultaneous you directed the local officers to fix a day for selling the tract to the highest bidder of these two applicants in the event that no appeal should be taken from your judgment.

From your judgment both parties appealed.

Owing to the fact that a large number of cases presenting the same questions involved in this were pending in your office, an early consideration was recommended. It was thereupon made special, and on consideration the judgment of your office was affirmed.

The errors assigned by counsel in their motion for review are as follows—

First. In referring to the telegraphic instructions of the Hon. Commissioner of the General Land Office, carrying into effect the last and potential directions of Mr. Secretary Noble for the disposition of the lands specified, the decision recites that

the register and receiver were thereby advised to "conform to instructions heretofore given in so far as such instructions are consistent and harmonious with these directions." *In other words no right would be recognized by reason of settlement prior to the date of opening of said lands.*" The italicised words were not however used in the telegram referred to, nor were they, or words of similar import, used in the final and authoritative instructions to the local officers.

* * * * *

Second. In holding that the cases cited, to wit: *Geer v. Farrington*; *Shire et al. v. C., St. P., M. & O. R. R. Co.*, "and many others" announcing the same doctrine, are distinguished from this in that no such orders, instructions or directions had been given prior to the time when the reservation covering the land was removed, as were specifically given in respect to settlement upon lands in this case.

* * * * *

Third. In ignoring the fact that Mr. Secretary Noble's order of March 11, 1891, which discriminated against settlers by directing that the lands referred to should be open to entry on April 17, 1891, but *not open to settlement* until the following day, was superseded by his order of October 22, 1891.

Fourth. In ignoring and disregarding said order of October 22, 1891, in this that it stated that said lands are "hereby restored to the public domain and opened to settlement and entry under the general land laws, *as construed by this department.*"

Fifth. In construing any of the various orders of Mr. Secretary Noble in the premises as intended to abrogate the law with respect to settlements as announced uniformly in decisions covering a period of nearly twenty years.

Sixth. In holding that the lands referred to were first directed to be restored by order of February 11, 1890, they having been in fact restored by order of August 17, 1887, and never thereafter withdrawn for any purpose by competent authority.

Seventh. In finding that the settlement of Hussey was made in direct violation of the orders and directions of the Department, assuming the superseded order of March 11, 1891, to be in force, it appearing that his settlement was made July 4, 1890, prior thereto, and while the order of February 11, 1890, directing the land to be restored to the public domain and "open to settlement under the general land laws" was in force.

With the files I find an argument by Mr. N. B. Wharton, an attorney claiming to represent a large number "of the settlers claiming the lands to be disposed of by the decision in this case;" also a brief from Messrs. Brossard and Colignon representing "a considerable number of those cases." These briefs are presented in support of the motion for review. Counsel for Newell move that the briefs be stricken from the files, for the reason that they have no authority to represent Hussey, and have no interest in the case "beyond that of claiming to represent other litigants who assert that they are interested in the principle involved." This motion ought not to be sustained. The attorneys filing the briefs state very explicitly their position; they do not claim to be employed by, or to represent, Hussey, but appear rather as *amicus curiæ* for the sole purpose of presenting their views on questions to be decided in this motion which will affect their clients in cases now pending in your office. Newell is not prejudiced by this, because his attorneys were served with copies of the briefs.

It seems to me that in the further consideration of this case it is only necessary to discuss the action from the date of the order of Mr. Secretary Noble suspending the order of March 11, 1890. That order,

which is a telegram to the register and receiver, dated April 16, 1891, is as follows—

I am in receipt, by reference from the Commissioner of the General Land Office, of your telegram of this date, stating that the situation is unchanged; that about four hundred men are crowded together around the filing windows, most of them armed. I am also in receipt of a telegram from F. C. Chamberlain, signing himself for two hundred and fifty men in line, presumably the armed men referred to in your telegram, to the effect that about two hundred and fifty of these armed men threaten to bring about a riot, bloodshed and great loss of life and property unless your office receives filings in the order in which said two hundred and fifty men desire they should be received.

In view of these facts and desiring to serve the interests of the general public rather than to obey the behest of any armed body of men present, seeking to serve their individual interests by intimidating law-abiding citizens, you are instructed that under and by virtue of the authority in me vested I hereby direct that all orders authorizing filings and settlement on the seventeenth and eighteenth instant, on lands included in the restored portions of the grant to the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, within the limits of your land district, be, and the same are hereby suspended until further notice, *and that said lands are reserved from entry and settlement and no filings thereon shall in any case be received by you until further orders and until advised by me through the Commissioner of the General Land Office.*

It will be conceded that this order suspended the previous one, and the authority of the Secretary of the Interior to make the order "that said lands are reserved from entry and settlement," etc., as italicised in the above dispatch, cannot be questioned. The effect of this part of the order is exactly in harmony with all the instructions issued in relation to the settlement of these lands, that is, that they should be so reserved and preserved as to give all an equal opportunity to procure the same.

It is conceded by all that the situation of affairs at the Ashland office and on this land was threatening, and all the ingenuity of the Department was brought to bear in order to avoid an open conflict of armed men and bloodshed in the opening of these valuable lands.

The matter rested in abeyance after the order above quoted until October 22, 1891, when the Secretary issued the following order addressed to the Commissioner—

It is hereby ordered that all lands in the Ashland (Wisconsin) land district under withdrawal heretofore made, and held for indemnity purposes under grants for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, be and are hereby restored to the public domain and opened to settlement and entry under the general land laws, as construed by this Department, *Provided*, that this order shall not take effect until public notice of the contents hereof shall have been given in the vicinity of said lands for six days under your direction.

In connection with such notice you are instructed to announce that no person will be recognized as acquiring any claim or right to any of said lands who seeks to initiate or perfect the same by means of force, threats or intimidation.

On the same day your predecessor sent the register and receiver the following telegram—

In compliance with an order of the Honorable Secretary of the Interior of this date, you are directed to post in your office and publish in a weekly and also in a

daily newspaper of general circulation in the vicinity of the lands, notice that on Monday November second eighteen hundred and ninety-one, all lands in your district under withdrawals heretofore made and held for indemnity purposes for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, will be restored to settlement and entry. Said lands being the same referred to in the letter of my predecessor dated January eight eighteen ninety-one. In the notice you will announce that no person will be recognized as acquiring any claim or right to any of said land who seeks to initiate or perfect the same by means of force, threats or intimidation. You will, for general information, republish as a part of such notice, the list of lands heretofore published. Conform to the instructions heretofore given in so far as such instructions are consistent and harmonious with these directions. The first publication in both the weekly and daily papers should be made not later than Saturday the twenty-fourth instant.

It is contended by counsel that there is a variance in the order of the Secretary, and that of the Commissioner in this: that the former declares the land "restored to the public domain and opened to settlement and entry *under the general land laws, as construed by the Department,*" while the Commissioner's instruction to the register and receiver was, "conform to instructions heretofore given in so far as such instructions are consistent and harmonious with these directions." Counsel for Hussey insist that if the Secretary's order, as italicised above, prevails, then he is entitled to the land under the rulings in the cases of *Geer v. Farrington* (4 L. D., 410); *Smith v. Place* (13 L. D., 214); and others, wherein it is held that while settlers upon land under reserve acquire no rights as against the government, yet as between themselves the Department will consider their equities and award the land to the prior occupant.

But I cannot adopt this view of the case. All the orders issued by this Department in regard to this land have contained the positive injunction that settlers should not intrude upon the land until lawful permission was given. It seems to me that where parties have gone on the land without authority of law and in direct violation of the order of the Secretary it is idle to talk of their *equities*. This land was not agricultural to any extent, but was chiefly valuable for its timber, and it does not therefore seem probable that persons would go upon it and wait months, or years, perhaps, at least, for an indefinite period, for it to be legally subject to entry and settlement, for any other purpose than to secure the timber. The distinction drawn between the cases cited above and the one at bar is therefore, in my opinion, an eminently proper one.

I do not think it consistent with sound reasoning that Mr. Secretary Noble, after endeavoring to keep the land in *statu quo* by preventing intruders from getting on it, intended by the language of his order to the Commissioner to annul all he had so strenuously endeavored to do previously.

I am unable to discover any inconsistency in these two orders. It seems to me that the only interpretation to be placed upon the Commissioner's dispatch when he says, "conform to instructions heretofore given," etc.,

is that it was not contemplated that any rights should accrue to those who had gone upon the lands in violation of the order of the Secretary of April 16, 1891. All other instructions had been suspended and the order of the Secretary of October 22, 1892, did not in terms or by implication reinstate them. So that, ascribing to Mr. Secretary Noble the intention to enforce the order so often promulgated that the land should be kept clear of intruders, and that settlement and entry should be allowed on the day to be fixed by the Commissioner "under the general land laws, as construed by this department," it is clear that the Commissioner's order was consistent with the order of October 22, of the Secretary.

I think this conclusion is sufficient to dispose of this motion. The criticism of counsel in the first specification of error on the paragraph quoted from the decision is perhaps well taken, as a casual reading of the same might lead one to think that the words italicised were included in the telegram of the Commissioner. The quotation, however, as an entirety, is taken from the Commissioner's decision, and the italicised words are simply his construction of his own dispatch.

The motion is denied.

DURESS—CONTINUING MENACE—RATIFICATION.

WOODLE *v.* PARKER ET AL.*

A plea of duress set up to avoid the withdrawal of a contest cannot be accepted, where it appears that the contestant subsequently ratifies the act of withdrawal in the absence of any threats or fears of violence.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 16, 1892.

The land involved in this appeal is the NW. $\frac{1}{4}$ of Sec. 14, T. 102 N., R. 45 W., 5th P. M., Marshall, Minnesota, land district.

The record shows that Charles L. Parker made timber culture entry for said land March 3, 1879. On July 10, 1886, Thos. P. Woodle filed an affidavit of contest against the same alleging:

That the said tract of land was not subject to entry as aforesaid, under the timber-culture act in this: that on said section there was and is a tract of not less than fifteen acres of land covered with a natural growth of timber from five to thirty feet high and from three to twelve inches in diameter—said trees consisting of elms, cottonwoods, ash, soft maples, box elders, etc.

At the same time he tendered his application to make homestead entry of the tract.

On July 13, 1886, he withdrew said contest, and it is shown, although the papers are not in the files, that on the same day Charles L. Parker filed a relinquishment of his entry and Mitchell J. Parker filed pre-emption declaratory statement for said land.

* Not reported in Vol. XV.

By letter of August 4, 1886, to your office, the attorney for Woodle stated that,

The withdrawal by Woodle of his contest was done under compulsion, and therefore, he applies to be placed in *statu quo* without regard to said withdrawal and the entry of Mitchell J. Parker who was cognizant of all the facts in the case.

By your order, affidavits were filed by each of the parties on this subject and you decided March 10, 1887, that

In view of the latter it is not necessary that Woodle should prosecute the contest initiated by him to successful termination to enable him to enter. You will therefore allow Woodle's application as of date he applied to enter and the filing of Mitchell J. Parker is accordingly held for cancellation.

On appeal by Parker, this Department on September 13, 1888, modified your decision and held that,

The manner of procedure in this case was irregular and it would seem not in accordance with the rules and regulations governing such cases. Instead of deciding that Woodle's withdrawal was brought about by fear of personal violence upon the record as it then stood, there being no evidence on that question except *ex parte* affidavits equally positive on each side and directly contradictory in the statements contained therein, the proper course it seems would have been for your office to order a hearing with a view of determining the true facts and circumstances surrounding the signing and execution of said withdrawal. In the event that the evidence adduced by such hearing justifies the re-instatement of Woodle's contest, which is all that he has asked, then further proceedings should be duly had to determine the effect of Charles L. Parker's relinquishment and filing upon the rights of the various parties, and if necessary to determine the truth of the allegations made in Woodle's contest affidavit.

In pursuance of this order a hearing was ordered by the local officers and after reciting the substance of the order above quoted, the notice of the hearing served on the parties reads as follows:

In view of the foregoing notice is hereby given that a hearing will be held at this office on December 27th, 1888, at 1 o'clock p.m., for the purpose of determining whether said withdrawal of Thomas P. Woodle was made voluntarily or whether as he alleges, it was compulsory and not his free act and deed, and whether the said contest initiated by Woodle should be re-instated for hearing.

The hearing was accordingly had and as a result thereof, the local officers found that the withdrawal was procured by intimidation and was not voluntary. Parker appealed, and you by letter of February 11, 1891, affirmed their decision and further said "that the relinquishment of Charles L. Parker's entry was the result of Woodle's contest, and it is so held," and you held Mitchell J. Parker's pre-emption filing for cancellation and directed that Woodle's homestead entry remain intact. Parker again appealed. The assignment of errors, fifteen in number, are largely addressed to your findings of fact and the consideration of alleged improper testimony. Your action in holding that Charles L. Parker's relinquishment was the result of Woodle's contest, and in holding Woodle's entry intact and cancelling Mitchell J. Parker's pre-emption filing is also assigned as error.

The testimony shows that there were distributed in the village of Luverne hand bills calling a meeting of the citizens of the place on July 12, 1886, of which the following is a copy:

INDIGNATION MEETING.

A meeting of the citizens of Luverne will be held at Armory Hall, this (Monday) evening, July 12, to take action in relation to an attempt made by a citizen of Luverne to "Jump" C. L. Parker's tree claim.

MANY CITIZENS.

The testimony also shows that in the afternoon of that day Woodle was advised by his friends not to attend the meeting as there was fear of personal violence if he did. He therefore stayed at home, but after the meeting was organized a committee of five was appointed by the chairman to wait upon Woodle and invite him to attend the meeting. One or more of the committee declined to act unless the meeting would guarantee that no harm should be done to Woodle if he came. This promise was given, and then the committee waited on him and he was informed of its mission; they guaranteed him that he should not be harmed if he would go. He went to the meeting where he listened to some speeches, the tenor of which was that this act in contesting the claim was an outrage; that they had a way of dealing with horse thieves and land thieves should be similarly dealt with. He was called upon to make a statement and said he thought he had a legal right to contest the entry; that he had initiated his contest in good faith and should let the law take its course. This announcement was received with hisses and groans by the crowd. Finally the committee who had brought him there were instructed by the meeting to go with him into a back room for the purpose of consulting with him, with a view of ascertaining what could be done. They accordingly went back of the stage in the hall, a curtain simply, dividing them from the audience. In about ten minutes the meeting appointed another committee of three to wait upon the first committee and inform it that it had had time enough to consider the matter. During the time the committee was consulting with Woodle, such expressions as "Watch the doors and windows;" "Don't let him escape," and "he had better give it up or he will never get out alive," were made by the crowd in tones sufficiently loud to be heard by Woodle. To allay the apparent ill feeling of the crowd, one of the original committee came forward on the stage and asked its indulgence for a few minutes longer as he thought something would be accomplished. The testimony as to just what transpired at this consultation is somewhat conflicting, but it is not claimed by Woodle that any threats of violence were made by the committee, and one of their number testifies that they represented to Woodle, Parker's condition; that he was a poor, crippled, hard-working man, with a large family to support and that he was unable to stand the expense of a contest; that Parker had paid \$1100, for the claim, and through una-

voidable misfortunes had been unable to perfect his title to it. This witness testifies that Woodle said then "that if he had known the circumstances he would not have instituted the contest," and that he had been to some expense amounting to \$19.00 in the matter and if that was returned he would withdraw his contest. Woodle signed the withdrawal in this room and the same was witnessed by two of the committee. A collection was then started in the meeting to reimburse him for the money he had expended and \$6, was collected and paid over to him, and the balance was guaranteed him by those present. The withdrawal was then turned over to Chas. L. Parker, who was present at the meeting. The crowd then dispersed. Subsequently, it was suggested that the withdrawal should be acknowledged, and about 11 o'clock that night, some two hours after the meeting adjourned, Chas. L. Parker and the clerk of the district court, went to Woodle's house and he acknowledged the execution of the withdrawal as his free and voluntary act.

It is but justice to the defendants to say that Chas. L. Parker though present is not shown to have participated in the proceedings, and that Mitchell J. Parker was not present. Neither of them was instrumental in getting up the meeting.

Woodle swears that he was induced to sign the withdrawal by reason of fear of personal violence, and, while he did not fear personal violence from Parker and the district clerk when he acknowledged the withdrawal, yet he was still laboring under the fear and excitement engendered by the meeting. It seems clear from the evidence that the scene presented at Armory Hall was one calculated to excite fear in the mind of any man of ordinary firmness and induce him to do that which he had refused to do before going behind the scene.

The testimony further shows, however, that a week or ten days after the meeting, Woodle received without objection \$12, more of the money promised him. He says he did not ask for it, but the witness who paid it to him denies this and swears that he did. Be that as it may, Woodle swears: "I was not at the time . . . (they) . . . paid me this money in any fear of bodily harm;" "I had got over my fear and excitement when I was paid the \$12." The balance of the money due was paid Woodle says, about two—the witness who paid it says three—weeks after the meeting, and Woodle says he asked for this, and also swears: "I was not at that time in fear of any bodily harm."

Now, admitting that he was under duress *per minas* at the time he withdrew his contest, in view of his subsequent conduct, when all fear and restraint were removed, can he claim his act of withdrawal as void? In other words, has he not by his subsequent conduct ratified his former act? "A contract made under duress is not, strictly speaking void, but only voidable, because it may be ratified and affirmed by the party upon whom the duress was practiced." (Parsonson Contracts, 395, 6th Ed.) Woodle's withdrawal of his contest was valid until he elected to

disaffirm it, which he has a legal right to do. The act of receiving the money was not, in itself, a ratification of the withdrawal, but when he says that at the time he received it, there was no fear of violence in his own mind, that the duress had ceased, he ratified his act. There is no evidence of any continuing menace. Ten days after the scene of violence, he received part of the money and three weeks afterwards the remainder. He had had sufficient time to decide what course to pursue; he elected, without any restraint, to ratify his withdrawal. He must abide his decision. The Department will not aid him in this play of fast and loose.

It was manifestly erroneous for you to decide that the relinquishment of Parker's entry was the result of Woodle's contest. The hearing under consideration was not intended to include this issue; the order of the local officers clearly defined the purpose of the hearing and there was no testimony offered upon any other point than that ordered. In fact the contestant only sought to have his contestant re-instated.

Your judgment is reversed. You will cancel the homestead entry of Woodle and re-instate the pre-emption filing of Mitchell J. Parker.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891—ALIENATION.

SMITH v. DEVINE ET AL.

A bona fide purchaser of the land covered by an entry who subsequently sells a portion of the land embraced therein, and then joins in the release to the United States of all title held under said entry, except as to one tract, may properly invoke the confirmatory provisions of section 7, act of March 3, 1891, as to said tract.

The sale of land shortly after making proof and the issuance of final certificate does not warrant a presumption against the good faith of the entryman.

First Assistant Secretary Sims to the Commissioner of the General Land Office, September 30, 1893.

On the 20th of April, 1886, Francis Devine made pre-emption cash entry for the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 30, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lot 7 of Sec. 31, T. 63 N., R. 11 W., Duluth land district, Minnesota.

On the 21st of the same month, Devine and his wife executed a mortgage on the premises to A. Kunz, for two hundred dollars. This mortgage was satisfied on the 17th of September, 1886, according to the abstract of title forming part of the record in the case.

On the 24th of August, 1886, Devine and his wife executed a warranty deed, conveying the entire tract to Jacob R. Myers, for the sum of fifteen hundred dollars, he to assume and pay the mortgage to Kunz for two hundred dollars, already mentioned. The original deed, which is among the papers in the case, shows that it was recorded in the proper office on the 7th of September, 1886.

On the 1st of October, 1886, Myers and wife conveyed by special warranty deed, to David T. Adams, an undivided one-eighth of the tract, and by a similar instrument, executed by them on the same day, an undivided one-eighth was conveyed to James A. Boggs. On the 30th of November, 1888, they conveyed to said Adams, by a similar instrument, an undivided one-quarter of the tract.

On the 17th of August, 1889, the persons who then had title to the land for which Devine made entry, quit claimed to the United States their interest in the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 30, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 31. This was all the land for which he made entry, except lot 7 in Sec. 31.

On the said 17th of August, 1889, the local officers allowed Thomas Meradith to make soldier's additional homestead entry for the land thus quit-claimed to the United States, and issued to him final certificate and receipt bearing that date. On the same day, he conveyed by warranty deed, an undivided one-half of said land to Jacob R. Myers, an undivided three-eighths to David T. Adams, and the other one-eighth to the Syndicate Land Company.

On the 10th of September, 1889, Devine executed a relinquishment of all the land covered by his entry, except lot 7 in Sec. 31. This was afterwards filed in the local office, and across its face is written "relinquished and canceled." This is without date.

On the 5th of September, 1890, Charles Smith filed an affidavit of contest, in which he alleged that the entry and the final proof of Devine were fraudulent and void, and that at the time of making the same, he had not complied with the provisions of the pre-emption law, in the matter of residence and of improvements. He also alleged that the soldier's additional homestead entry of Meradith was fraudulent and collusive, and made for the purpose of securing said land to said Devine and other parties to contestant unknown, who procured said Devine to make said fraudulent proof, relinquishment and re-entry.

A hearing was ordered, of which all parties in interest were notified. At the hearing, the attorney for Myers moved that all proceedings be dismissed, and that the entry of Devine be confirmed under the provisions of section seven of the act of March 3, 1891, (26 Stat., 1095). In support of the motion, the affidavit of Myers was filed, in which he made oath that he purchased said land of the entryman in good faith, paying therefor the sum of fifteen hundred dollars; that at the time of said purchase, he believed the entryman had in all respects complied with the requirements of law; that he was a bona fide purchaser for a valuable consideration, and that no fraud had been found, or could be found by a government agent on his part; that his purchase was made prior to the first day of March, 1888, and after final entry.

The local officers overruled the motion, on the ground that the rights of the contestant had attached prior to March 3, 1891. The case then proceeded to trial, and on the 9th of May, 1891, the local officers ren-

dered their decision, in which they recommended that the entry of Devine be canceled, and that of Meradith confirmed. From that decision appeals were taken to your office by all the parties.

On the 7th of March, 1892, the attorney for Myers filed in your office a motion for the confirmation of the entry of Devine, in accordance with the provisions of section seven of the act of March 3, 1891. In determining that motion, the entire record was examined and the case disposed of on its merits, applying the provisions of the act of March 3, 1891, to the facts established by the record.

Your office decided the case on the 19th of May, 1892, and the conclusion was that the entry of Devine was fraudulent, but that it was confirmed by the act of March 3, 1891. It was further held that title to the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 30, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 31, vested in the parties who quit-claimed that land to the United States on the 17th of August, 1889, and the entry of Devine for that land was canceled, and it was held that the soldier's additional homestead entry of Meradith was properly allowed, and that his immediate conveyance thereafter, did not impair the legality of said entry. Your office therefore reversed that part of the decision of the local officers, which recommended the entry of Devine for cancellation, and affirmed that part which sustained the entry of Meradith. An appeal from said decision brings the case to the Department.

In the argument upon the appeal before me, it is insisted that Myers was not entitled to have the entry of Devine confirmed under the provisions of section seven of the act of March 3, 1891, because at the time of the hearing he was the owner of only an undivided half of the land covered by said entry. The case of *Bradbury v. Dickinson* (14 L. D., 1), is cited in support of that proposition. In that case the Department held that "the sale of an undivided interest in the lands covered by an entry, prior to March 1, 1888, does not bring said entry within the confirmatory provisions of section seven, act of March 3, 1891." The facts in that case, and the one at bar, are materially different. In that case, Dickinson made final entry on the 4th of January, 1887, and sold an undivided one-half of said tract to Thomas Doak, on the 6th of January following. In the case at bar, Devine made final entry on the 20th of April, 1886, and sold the *whole* of the land embraced in his entry to Myers, on the 24th of August, 1888. It is clear, therefore, that the rule laid down in *Bradbury v. Dickinson*, and re-affirmed in *Emblen v. Weed*, (16 L. D., 28) does not apply to the case at bar.

Section seven of the act of March 3, 1891, provided that entries in which final proof and payment had been made, and certificate issued, and to which there were no adverse claims originating prior to final entry, which had been sold or incumbered prior to the 1st of March, 1888, and after final entry, to bona fide purchasers, or incumbrancers, for a valuable consideration, should be confirmed and patented upon presentation of satisfactory proof to the Land Department of such

sale or incumbrance, unless, upon an investigation by a government agent, fraud on the part of the purchaser had been found.

In the case of *Joseph S. Taylor* (12 L. D., 444), it was held that fraud on the part of the entryman, would not defeat the confirmatory provisions of said section, in cases containing the conditions therein enumerated. In the case of *George De Shane, et al.*, on page 637 of the same volume, it was held that an entry made by one not shown to be qualified in the matter of citizenship, was confirmed under the provisions of said section. In *Harnish v. Wallace* (13 L. D., 108), it was held that the confirmatory provisions of said section, for the benefit of a transferee who acquired title prior to March 1, 1888, were not dependent upon the entryman's compliance with law in the matter of residence and improvements. The same doctrine was repeated in the case of *William H. Rambo, et al.*, on page 152 of the same volume.

In *Axford v. Shanks* (13 L. D., 292), it was held that Congress contemplated the relief of incumbrancers and purchasers, described in said section, and that the illegality of the entry, or the pendency of a contest, would not defeat confirmation thereunder. See also *Shepherd v. Ekdahl* (13 L. D., 537), and *Peterson v. Cameron, et al.*, (13 L. D., 581). Numerous other cases to the same effect, might be cited.

In the case of *the United States v. Gilbert, et al.*, (14 L. D., 651), it was held that in determining the rights of a transferee under section seven of the act of March 3, 1891, the transferee was protected by the presumption that it was made in good faith, up to the point where sufficient evidence was furnished to overcome it. In the case at bar, that point was not reached, while all the conditions requisite to confirmation under said section was shown to exist, by the production of the final receipt and certificate of the local officers, the original deed from Devine and wife to Myers, and the testimony and sworn statement of the latter.

The entry being confirmed by the provisions of said section, it matters not what disposition Myers made of the land, after obtaining title thereto, provided he did not reconvey it to Devine.

This disposes of the contest, so far as the entry of Devine is concerned, and leaves for consideration only the charge of the contestant that the soldier's additional homestead entry of Meradith was fraudulent and collusive, and made for the purpose of securing said land to Devine and other parties to contestant unknown.

Not one word of evidence in support of this allegation was introduced at the hearing. In fact, the name of Meradith is not mentioned in the testimony, nor was the contestant sworn in his own behalf. The abstract of title, which showed his conveyances immediately after making final entry, was introduced in evidence, and upon that, I am asked to find that his entry was fraudulent and collusive.

In making his additional entry, he made oath that he had fully met all the requirements of the homestead law as to his original entry; that

he had not sold his additional homestead claim, nor made any prior application for an additional homestead certificate, and that his present entry was made for his own exclusive benefit, and not directly or indirectly for the benefit or use of any other person or persons whomsoever.

His entry was therefore properly allowed, and after receiving final certificate he had a right to retain or to sell the land, as he thought proper. His sale so soon after securing final certificate, did not impair the legality of his entry, in the absence of any proof of fraud in making it.

In *Morfev v. Barrows* (4 L. D., 135), it was held that the sale of the land shortly after making proof and payment does not warrant a presumption against the good faith of the entryman.

The entry of Devine having been confirmed by the act of March 3, 1891, and that of Meradith being sustained upon the merits of the case, as presented by the record, it must be held that Smith failed in his contest, which is accordingly dismissed, and patent will issue for the land, if no other objections appear, and the proof required by circular of instructions, of May 8, 1891 (12 L. D., 450), is furnished your office.

PRE-EMPTION—SECTION 2260, R. S.—FINAL PROOF.

HASKINS v. MAYNARD.

A pre-emptor who in good faith, prior to settlement, transfers the land then owned by him to his wife, is not within the second inhibition of section 2260 R. S. Publication of notice of intention to submit final pre-emption proof precludes the subsequent allowance of an application to enter filed by a homestead claimant.

First Assistant Secretary Sims to the Commissioner of the General Land Office, October 2, 1893.

On April 15, 1889, Levi C. Maynard filed his pre-emption declaratory statement No. 6089 for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 4, T. 6 N., R. 13 W., S. B. M., Los Angeles, California, alleging settlement April 13, of that year. He gave notice of his intention to submit final proof, the same to be taken before the register and receiver March 12, 1890. Notice was duly published and proof taken as advertised. The improvements on the place, according to his own valuation, are worth \$395. One of his witnesses places the value at \$390, and the other at \$520. These improvements consist of a dwelling house, ten by twenty-six feet; a barn; and one hundred and fifteen acres broken, part of which was in cultivation. One of the witnesses valued the land at five dollars an acre, the other one at ten dollars. He had all the necessary household and kitchen furniture on the place, and his residence was continuous from date of settlement.

On March 4, 1890, eight days before the proof was submitted, and while the notice therefor was being published, Earl L. Haskins was allowed to make homestead entry of the land; and on the day proof was

submitted he appeared and filed a protest against its acceptance, on the grounds:

1. That Maynard removed from land of his own in said State to reside on his pre-emption claim.

2. That he has conspired with one Moody to defraud the government so as to obtain title to the land.

The protestant cross-examined claimant and his two witnesses; and, after a stipulation, duly entered into as to certain facts disclosed in the tract books had been offered, the case was closed.

The register and receiver recommended the acceptance of the final proof and the dismissal of the protest. On appeal, your office, by decision dated March 29, 1892, reversed that action, and held Maynard's filing for cancellation, on the ground that he "is not a qualified pre-emptor." An appeal brings the case to this Department.

No question is raised as to residence and improvements, and the facts relied on in proof of claimant's having moved from land of his own to reside on the public lands in the same State, thus bringing the case within the second inhibition contained in Section 2260 of the Revised Statutes of the United States, are as follows:

The land in question was first entered by Maynard, November 20, 1883, under the timber-culture laws. He so held the land until May 24, 1888, when he relinquished it, and, on the following day, William Moody made timber-culture entry for the land. Moody held the land until April 15, 1889, when he relinquished, and on same day, as above shown, Maynard filed his declaratory statement therefor.

It appears, also, that Maynard entered the SE. $\frac{1}{4}$ of Sec. 18, T. 7 N., R. 13 W., Los Angeles land district, California, November 5, 1883, upon which final certificate was issued March 23, 1889. This entry was patented December 5, 1890. On April 8, 1889, he deeded the land last above described to his wife for the consideration of "love and affection," and, on the 13th day of that month, moved to the land in controversy.

If, as held by you, "Maynard's transfer of the homestead land to his wife was a mere subterfuge to evade the provisions contained in the inhibition clause," it is proper that the entry should be canceled.

The circumstances attending the relinquishment of his timber-culture entry to Moody, and the latter's relinquishment to him after his proof had been made on his homestead, the voluntary deed to his wife soon after final proof was made on his homestead claim, and his settlement on the land five days later, are relied on, and so held by your office, as tending to confirm protestant's charge of fraud and collusion on the part of Moody and the claimant.

Regarding his own efforts to secure title to the land, by growing trees thereon, after he had made timber-culture entry therefor, November 20, 1883, he testifies that he plowed five acres the first year, and five acres more the second year, and replowed and cultivated the first

five acres. The third year he plowed ten acres and put it in trees, cuttings and seeds. The seeds and cuttings failed to grow. He asked the local officers for an extension of time, and replanted the following year. The trees did not do well, and, after spending so much time and money on the place, and suffering so many failures, he decided to relinquish, and when he did so, Moody made his timber-culture entry. Moody tried it for one year, also plowing the land for that purpose, and he also relinquished. Then it was that Maynard filed his declaratory statement.

These facts do not of themselves prove collusion on the part of Moody and Maynard, for the purpose of holding the land for the latter's benefit. It rather shows that an honest, but unsuccessful, effort was made to secure a growth of trees. Had Maynard wanted to hold the land for his own use until his homestead entry was out of his way, to enable him to secure it under the pre-emption laws, it was altogether unnecessary for him to have relinquished in favor of Moody, and then to have had Moody relinquish in his favor. He worked four years and six months on his timber-culture entry; he could have continued his efforts ten months longer—all that would have been necessary—and then relinquish the entry, sell his homestead, and file on the land, without the intervention or aid of Moody.

I therefore conclude, in the absence of other testimony, that there is not sufficient evidence in the record to warrant the charge of "collusion and fraud."

It is true, he sold his homestead to his wife fifteen days after final certificate was issued thereon. His final pre-emption proof shows that he settled on the land in controversy five days (not two days as you have it) after he executed the deed to his wife. These facts, taken alone and unexplained, might leave an inference that the transfer was made to enable him to avoid the statutory inhibition above alluded to. He positively denies, however, that that was his purpose. He states that he consulted the late register, Mr. Bethune, prior to filing on the land; showed the deed that he had made to his wife, and asked if he was entitled to his pre-emption right, and was then advised that he would have that right, and his papers were accordingly made out and filed.

The validity of a deed made in good faith from husband to wife is recognized by the Department, if such deed is valid under the laws of the state or territory where the land lies. (David Lee, 8 L. D., 502.)

It appears that for many years he had not held property in his own name. Prior to 1883, he owned some lots in Los Angeles, and deeded them to his wife. His reasons therefor were that he had been for several years a confirmed invalid, and deeded his property to his wife "to save litigation in case of my death."

Section 158 of the Civil Code of California provides that:

Either husband or wife may enter into an engagement or transaction with the other or with any other person respecting property which either might if unmarried.

In the case of *Peck v. Brummagin*, 31 Cal., 446, it is said:

No good reason is perceived why the husband, while free from debts and liabilities, may not make a gift to his wife of real or personal property, which at the time was the common property of the husband and wife.

In the case of *Barker v. Koneman et al.*, 13 Cal., 10, Justice Field says:

The law allows and even regards with favor provisions made by the husband when in solvent circumstances for the wife and family against the possible misfortune of a future day, by setting apart a portion of his property for their benefit.

Had Maynard made a bona fide sale of his homestead to some one else, and then moved on to the land, there could be no question raised as to the validity of his settlement. He had a legal right, as above shown, to deed the land to his wife; the consideration was a "good" one. Subsequent to the transfer, his wife appears to have managed the place, and there is nothing whatever, except the relations of husband and wife, from which it can be assumed that the transaction was a fraudulent one. Fraud is never presumed. It must be proven; and I do not think the mere relation of husband and wife, taken with all the facts and circumstances connected with the transfer, is sufficient to warrant the statement that the transfer was only a subterfuge to avoid the inhibition.

Maynard's transfer to his wife was only the carrying out of his accustomed acts; he made provisions against a possible, indeed a probable, contingency (owing to his failing health), by deeding the land to his wife, and thus making provisions for a possible misfortune. He did what "the law allows, and even regards with favor."

When Haskins made entry of the land, Maynard's notice to make final proof was then being published. It was therefore improper to have allowed the entry. *L. J. Capps*, 8 L. D., 406; *Smith v. Brearly*, 9 L. D., 175; *Mary E. Funk*, *idem.*, 215.

The land is worth from one to two thousand dollars; the improvements placed thereon by Maynard are valued at \$520. Haskins has done no work on the land. He made no effort to secure a cancellation of the filing until Maynard had lived on the land nearly a year, and had made all these improvements. I do not think he is entitled to a preference right on the showing made. His protest is therefore dismissed and his entry canceled. Maynard's final proof will be accepted and certificate will issue on payment for the land.

The decision appealed from is accordingly reversed.

SETTLEMENT RIGHTS—SECTION 2, ACT OF SEPTEMBER 29, 1890.

RENE v. PRENDERGAST.

The rights of an actual settler on railroad lands at the date of the forfeiture act of September 29, 1890, relate back, under the provisions of section 2 of said act, to the date of his actual settlement on the land.

Secretary Smith to the Commissioner of the General Land Office, October 4, 1893.

On May 4, 1893, your office transmitted, on the part of Peter Prendergast, motion for review of the decision of the Department of March 15, 1893 (unreported), in the case of Arthur O. Rene, against said Prendergast, in which your office decision of April 4, 1892, holding the homestead entry of Prendergast for cancellation, was formally affirmed.

The land involved in the controversy is the NE. $\frac{1}{4}$ of Sec. 15, T. 49 N., R. 9 W., Ashland land district, Wisconsin, for which Prendergast made homestead entry on the 23d of February, 1891. At a late hour of the same day, Rene applied to enter the land, his application being rejected on account of the prior entry of Prendergast. He then applied for a hearing, claiming prior settlement. The hearing resulted in a decision by the local officers, on the 1st of June, 1891, in favor of Prendergast. Such decision was reversed by your office on April 4, 1892, and in the motion before me, it is claimed the Department erred in affirming the judgment in said case. The errors complained of are enumerated as follows:

First. In affirming the Commissioner's decision upon the facts, when the record shows that Rene was but an occasional visitor to the land, with such improvements and cultivation as to render his classification as a *bona fide* settler absurd.

Second. In affirming the Commissioner's decision upon the facts, when the record shows Prendergast to have been the only *bona fide* settler upon the land on September 29, 1890, and as such entitled thereto, not only by reason of his entry, but also under the beneficial provisions of the second section of the act of September 29, 1890.

Third. In finding the law correctly stated by the Commissioner, when his decision was a plain evasion of the law, in that he allowed Rene the preferred rights of a *bona fide* settler, without the slightest evidence to support such findings.

Fourth. In finding the law correctly stated by the Commissioner, when his decision ignored and practically overruled a long line of decisions by both the courts of the country, and your Department, as to what constitutes *bona fide* settlement.

Fifth. In affirming the Commissioner's decision, which erroneously canceled Prendergast's entry without any sufficient showing of superior right in Rene.

This, and other land, had been granted to the Wisconsin Central Railroad Company, and was restored to the public domain by the act of September 29, 1890 (26 Stat., 496), entitled "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes." The 23d of February, 1891, was fixed, by official notice, as the day for the allowance of entries on said

lands, and the entry of Prendergast and the application of Rene were made on that day.

Both parties claimed under the provisions of the 2d section of the forfeiture act of September 29, 1890, which provided:

That all persons, who, at the date of the passage of this act, are actual settlers in good faith, on any of the lands hereby forfeited, and are otherwise qualified, on making due claim on said lands under the homestead law, within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act, and shall be regarded as such actual settler from the date of actual settlement or occupation.

The question presented by the motion before me is: Who are "actual settlers in good faith," within the meaning of this section?

An actual settler is one who has gone upon and occupied land with a bona fide intention of making it his home, and does some act in execution of such intention.

Bona fide is a legal technical expression, used in the statutes in England, and in the acts of the legislatures in all the States, and signifies a thing done really, with a good faith, without fraud, deceit, or collusion; in reality.

The act in question protected the rights of the persons, who, on the 29th of September, 1890, were residing upon the land, complying by honest acts with the expressed requirements and objects of the settlement laws then in force, and seeking in good faith to maintain a settlement and claim thereunder. It expressly provided, that to be entitled to its protection, the persons must be actual settlers in good faith upon the lands "at the date of the passage of this act."

Acts of settlement performed on the land years before the passage of the act, conferred no rights, unless those acts were followed by such residence as rendered the person an actual settler thereon, on the day the forfeiture act was passed. If, however, those early acts of settlement had been followed by residence, and improvements which had the character of permanency, and had continued until the 29th of September, 1890, the act provided that such person should be regarded as an actual settler from the date of his actual settlement or occupation of the land.

In the case at bar, it was made to appear, without doubt, that Rene was the first to go upon the land in question, and perform acts of settlement. This was in May, 1888, and his acts of settlement were building a house twelve by sixteen feet in size, and clearing a small patch of land around it.

Prendergast began his settlement upon the land on the 9th of September, 1890. He completed his house on the 20th of that month, and has made it his only home since. He was an actual settler and resident upon the land at the date of the passage of the act in question, and made claim therefor under the homestead law within six months thereafter. This made him an actual settler upon the land from the 9th of September, 1890, the date of his actual occupation thereof. He was aware

that Rene had built a house upon the land, more than two years prior to that time, but claimed that his settlement and improvements were not in good faith, and that he did not reside upon, or improve the land at all, from July or August, 1890, to May 12, 1891. To determine this question, an examination of the evidence in the case has been made.

From such examination, I have no hesitancy in concluding that the occupancy of the land by Rene, from May, 1888, to June, 1890, was not such as to meet the requirements of the homestead law. Had an adverse claim intervened during those two years, his "occasional visits" to the land would not have been sufficient to have constituted him an "actual settler in good faith", as his absences amounted to a substantial abandonment of the claim.

From June, 1890, however, the evidence shows that he made his home in his house upon the land, and cultivated patches thereof to potatoes, corn, beans, lettuce and radishes. His crops were not extensive in fact, nor remunerative in results, but it was shown that he raised several bushels of potatoes, a nice bed of lettuce, and a small quantity of string beans. The existence of these "crops" was sworn to by Rene and his witnesses, and the fact that a couple of patches of potatoes were grown by him upon the land during the summer of 1890, was admitted by Prendergast and several of his witnesses.

His clearing and cultivation, at the time of the passage of the act of September 29, 1890, were exceedingly meagre for a residence of two years and a half, but reckoned from the spring of 1890, were sufficient to meet the requirements of the settlement laws, as applied to actual settlers. While Prendergast did not see Rene, when he made his settlement on the land, on the 9th of September, 1890, he saw Rene's house, and his crops, or those which had not already been harvested by himself or the rabbits, were then growing thereon.

This constituted Rene an actual settler upon the land, prior to any act of settlement on the part of Prendergast, and rendered them both "actual settlers" at the date of the passage of the act of September 29, 1890. The settlement of Rene being prior to that of Prendergast, he has a superior right to the land, unless Rene is shown not to have acted in good faith.

Prior to the spring of 1890, I think his connection with the land was lacking in good faith, but since that time I do not find his conduct characterized by bad faith.

In view of this fact, and of the further fact, that nearly every one of the witnesses who testified in favor of Prendergast, and against Rene, was either a contestant, or a claimant against whose entry a contest was pending, and all thus situated admitted that they expected to use Prendergast as a witness in support of their claims, I am by no means convinced that the decision complained of was not correct.

I have carefully examined the record in the case, and considered the arguments of counsel upon the motion before me, and my conclusion is, that such motion should be, and it hereby is, denied.

DESERT ENTRY—FINAL PROOF—EQUITABLE ACTION.

GRAHAM v. COOKE.

Equitable action is not required on a desert entry, on account of failure to submit final proof and make payment for the land within the statutory period, where such failure is due to an order of the General Land Office postponing the day fixed for the submission of said proof.

First Assistant Secretary Sims to the Commissioner of the General Land Office, October 4, 1893.

On the 15th of August, 1888, Walter A. Cooke made desert land entry for the SW. $\frac{1}{4}$ of Sec. 5, the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 6, the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 7, and the NW. $\frac{1}{4}$ of Sec. 8, T. 6 N., R. 39 E., Blackfoot land district, Idaho. In describing the land, in your letter of June 9, 1892, to the register and receiver at Blackfoot, your office inadvertently speak of the entry as being in township 8, while the appellant, in his notice of appeal, places it in township 7.

On the 25th of April, 1891, Joseph B. Graham filed an affidavit of contest against the entry of Cooke, alleging that the land was not desert in character, and not subject to entry under the desert land law.

A hearing resulted in a decision by the local officers, in favor of Cooke, which was affirmed by your office on the 9th of June, 1892.

On the 17th of August, 1891, Graham filed a second affidavit of contest against said entry, alleging that the entryman had not made his final proof and payment within three years after his entry, nor properly reclaimed the land within that time. The local officers refused to entertain this contest, and Graham appealed.

It appears that Cooke gave notice by publication, of his intention to make final proof and payment on the 15th of August, 1891, which was within the time allowed by law, but that the date for making such proof was postponed by you until the 28th of that month.

On the 28th of August, 1891, Cooke appeared with his witnesses to make final proof. A protest against such proof was filed by Graham, and he cross-examined Cooke and his witnesses. The local officers found in favor of the good faith of Cooke, and recommended that Graham's protest be dismissed. He appealed, and on the 9th of June, 1892, your office considered all the questions raised by him in the case, and dismissed his contests. He brings the case to the Department by appealing from said decision.

I deem it unnecessary to refer at greater length to the facts of the case. They are fully set out in said decision, and, I think, justify the conclusion reached by your office, except that under the circumstances of the case, I do not think it necessary to submit the entry of Cooke to the board of equitable adjudication for confirmation under Rule 30. That rule applies to entries in which "neither the reclamation nor the proof and payment were made within three years from date of entry."

In the case at bar, the reclamation was made within the time required, and notice was duly given by the entryman of his intention to make proof and payment also within the time limited for such purpose. The postponement of the date for making such proof was made by your office, such date being changed from the 15th to the 28th of August, 1891. In making this change, Cooke took no part, and his interests should not be injuriously affected, nor his rights jeopardized thereby.

His case should be disposed of in the same manner as would have been proper had his proof and payment been made on the 15th of August, 1891, the day advertised by him for that purpose. I think the protest of Graham was properly disposed of by the decision of your office, and the case is returned for appropriate action upon Cooke's final proof. The decision appealed from is modified accordingly.

HOMESTEAD ENTRY—DEATH OF ENTRYMAN.

TUNGATE v. ROAN.

Where a homesteader dies during the pendency of proceedings on his protest against the final proof of an adverse pre-emption claimant, his heirs may perfect title on the final disposition of the adverse claim.

First Assistant Secretary Sims to the Commissioner of the General Land Office, October 5, 1893.

The land involved herein is the SE. $\frac{1}{4}$, Sec. 22, T. 32 S., R. 33 E., M. D. M., Independence, California, land district.

It seems from the record that Ann Roan filed her pre-emption declaratory statement for said land July 7, 1887, alleging settlement May 17, preceding, and gave notice of final proof to be made before the county clerk of Kern Co., at Bakersfield, June 17, 1889. On said day John B. Tungate filed before said clerk his protest against said proof, alleging that he made homestead entry of said land May 20, 1889; that on May 11, preceding he established his residence on the land and has lived there ever since with his family; that Ann Roan did not make settlement on said land at any time; that she has never established actual residence thereon or cultivated it; that said land was not taken for her own use and benefit but for her son-in-law.

The testimony was taken before the said clerk and upon examination the local officers decided to accept the final proof. Tungate appealed and your office, on April 16, 1892, reversed their decision, whereupon the defendant prosecutes this appeal, alleging that it was error to hold (1) that claimant had not shown good faith in filing; (2) in holding that the claimant did not desire the land for her own use and benefit, and also (3)

erred in deciding in favor of protestant on April 16, 1892, as the protestant at that time had been dead for more than two years last past, and as the prior decision of

the register and receiver of the local office at Independence, California, was in favor of claimant, the protestant had gained no rights under the law, by virtue of his protest, his protest therefore ended with his life.

It will be observed that the first two errors are addressed to her good faith in filing, and that the land was not sought by her for her own use and benefit. It must, therefore be assumed that the finding upon the other points at issue is not questioned, that is, that she did not establish or maintain a residence upon the land. This being among the charges and having been found to be proved by the testimony, it would seem as if it were a work of supererogation to discuss the two questions presented, because, admitting for the sake of argument that the two specifications are well taken, yet the defendant must fail because she did not establish or maintain a residence upon the land.

But aside from this, I am satisfied that the evidence sustains the conclusion on the matters suggested by the specifications of error. It is shown that the claimant is a woman, sixty-one years of age, and has been living with her daughter, the wife of McFarlane, for several years; that he bought and paid for the relinquishment of a prior entry; that he contracted and paid for the construction of the house and the fences; that he negotiated the lease of the premises and figured conspicuously in the trouble that seems to have been had over it. It was at his house that the old lady always returned from her visits to the land and elsewhere. While it is commendable, perhaps, in the son-in-law to aid his wife's mother in securing herself a home and subsistence, yet I can not resist the conviction from the testimony in this case that McFarlane was the real party in interest in this entire transaction, and that the land was taken in his interest.

By affidavits of the attending physician and others, dated June 11, 1892, it is shown that the contestant Tungate departed this life March 7, 1890. It does not appear that his death had been suggested at the time you decided the case. It is now insisted by defendant's counsel that the contest should be dismissed for the reason that the contestant's preference right under the act of May 14, 1880 (21 Stat., 140), and the former departmental decisions, being a personal right in the successful contestant, dies with him. (*Morgan v. Doyle*, 3 L. D., 5; *Hurd v. Smith*, 7 L. D., 491.)

But in the cases of *Johnson v. Cleaveland* (8 L. D., 405), and *Poisal v. Fitzgerald* (15 L. D., 19) it has been decided that this rule does not apply to cases where the contestant has some other claim or right besides simply the preference right conferred by statute.

Now in the case at bar, the defendant had simply a preemption right; that is the privilege of purchasing the land upon a compliance with the law, and her filing was not a segregation of the land. Therefore Tungate had a legal right to make a homestead of the land, which he did. He established his residence thereon and was living there at the time of the contest and at the date of his death. It seems to me that he

was something more than a mere protestant, or contestant; that he had a right in the land. And it seems to me that this is demonstrated to a certainty when his position is considered in all its phases. The statute gives the successful contestant a preference right for thirty days after notice of the judgment in which to "enter said lands." Tungate lawfully entered said lands before filing his protest. If he had lived it can not be maintained that any other act of his was necessary to the initiation of his right to the land. Hence, I think it follows, that he had such a right in the land subject to the result of the contest, as was descendible under the law to his heirs.

Said judgment is therefore affirmed and the heirs-at-law of John B. Tungate will be permitted to make final proof on said entry in accordance with law.

RAILROAD LANDS—ACT OF JANUARY 13, 1881.

MOORE *v.* KELLOGG.*

The act of July 6, 1886, forfeiting the grant to the Atlantic and Pacific railroad company did not give the Southern Pacific company any rights to lands so forfeited and lying within its indemnity limits; but said lands reverted to the United States, and after the passage of said act were open to settlement.

An application to purchase under the act of January 13, 1881, confers no rights upon the applicant if the land was not in fact withdrawn for the benefit of the railroad company.

First Assistant Secretary Sims to the Commissioner of the General Land Office, October 5, 1893.

The record shows that Mattie Moore made homestead entry, December 31, 1890, for the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lot 1, (SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$) and lots 2 and 3 of sec. 29, T. 4 N., R. 19 W., S. B. M., Los Angeles land district, California.

On December 20, 1890, Norman A. M. Kellogg filed an application to purchase lot 1, the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of sec. 29, T. 4 N., R. 19 W., S. B. M., of the district aforesaid.

The land in controversy is within the twenty-mile limits of the grant to the Atlantic and Pacific Railroad company, and included in the indemnity limits of the Southern Pacific company.

Kellogg made application for a hearing before the register and receiver to determine the conflicting claims of himself and Moore, and, on June 9, 1891, the local officers rendered their joint opinion holding for cancellation the homestead entry of Moore, and allowing Kellogg to purchase, under the act of Congress of January 13, 1881 (21 Stat., 315).

On July 1, 1891, Moore appealed, and on May 16, 1892, your office decision was rendered affirming the finding below. July 18, 1892, Moore appealed to the Department.

*See XI L. D., 534.

It is claimed that Kellogg had a right to purchase the land in controversy under the act of Congress, *supra*. The act referred to is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons who shall have settled and made valuable and permanent improvements upon any odd numbered section of land within any railroad withdrawal in good faith and with the permission or license of the railroad company for whose benefit the same shall have been made, and with the expectation of purchasing of such company the land so settled upon, which land so settled upon and improved, may, for any cause, be restored to the public domain, and who, at the time of such restoration, may not be entitled to enter and acquire title to such land under the pre-emption, homestead, or timber-culture acts of the United States, shall be permitted, at any time within three months after such restoration, and under such rules and regulations as the Commissioner of the General Land Office may prescribe, to purchase not to exceed one hundred and sixty acres in extent of the same by legal sub-divisions, at the price of two dollars and fifty cents per acre, and to receive patents therefor.

But this land was within the primary limits of the grant to the Atlantic and Pacific Railroad company under the act of July 27, 1866 (14 Stat., 292), as shown by its map of definite route, filed March 12, 1872, and for this reason, was not subject to selection as indemnity land for the Southern Pacific Railroad company, under its grant made by act of Congress of March 3, 1871 (16 Stat., 579).

In the case of the United States *v.* Southern Pacific Railroad Company (146 U. S., 570), the supreme court, speaking through Justice Brewer, says:

Our conclusions, therefore, are, that a valid and sufficient map of definite location of its route from the Colorado River to the Pacific Ocean was filed by the Atlantic and Pacific Company, and approved by the Secretary of the Interior; that by such act the title to these lands passed, under the grant of 1866, to the Atlantic and Pacific Company, and remained held by it subject to a condition subsequent until the act of forfeiture of 1886; that by that act of forfeiture the title of the Atlantic and Pacific was retaken by the general government, and retaken for its own benefit, and not that of the Southern Pacific Company; and that the latter company has no title of any kind to these lands.

It will thus be seen that the act forfeiting these lands of the Atlantic and Pacific Railroad Company did not give the Southern Pacific Company any rights to the land within the indemnity limits, but the land reverted to the federal government and after the said act was passed became open to settlement; and as the record shows that Mattie Moore made her application to file upon said land now in issue, together with other land, on August 10, 1888, at which time the land was opened to settlement, it follows that she has the prior right to it.

As the Southern Pacific Railroad Company has no legal rights in the land, Kellogg could acquire none by reason of his application to purchase from it.

The act of January 13, 1881, applies only to settlers upon lands of the railroad for whose benefit the land is withdrawn. In other words, if the land was not withdrawn for the Southern Pacific Railroad Com-

pany it is evident that the settler could acquire no rights by reason of his application to purchase. Kellogg settled upon this land in August, 1887, but he acquired and could acquire no rights under this settlement, as he had exhausted his homestead, pre-emption and timber-culture rights, and as regards the land in question, he was in the position of a mere squatter without legal rights or standing.

It thus follows that your office decision was in error and the same is hereby reversed. The entry of Moore will be allowed to remain intact and the application to purchase by Kellogg will be dismissed.

PRACTICE—NOTICE—APPEARANCE—DEFAULT.

HALL v. RUGG.

Appearance at a hearing without objection to the notice cures any defect therein.

A party may not plead a special appearance where the record discloses a previous general appearance without limitation as to the purpose thereof.

Where the defendant does not exercise the right of cross-examination, but relies upon an appeal from an interlocutory order, he will not be heard to object to the ex parte character of the testimony submitted by the contestant.

It is the duty of the local office, on its own motion, to dismiss a contest where the contestant is in default at the day of hearing; but where such course is not taken, and the contest is subsequently dismissed at the request of the defendant, and then reinstated on due showing and a general appearance filed by the defendant, the irregularity is not material.

First Assistant Secretary Sims to the Commissioner of the General Land Office, October 5, 1893.

On February 24, 1888, Percival N. Rugg made timber culture entry No. 11,892 on the NE. $\frac{1}{4}$ of Sec. 5, T. 7 S., R. 67 W., of the Denver, Colorado, land district.

On January 24, 1890, affidavit of contest was filed by Clarence Hall, alleging want of cultivation, and that the land covered by the entry was not "prairie land or other land devoid of timber," and thereupon notice was issued, and the parties summoned to appear on March 3, 1890. On appearance day the contestant made default, and on the 7th of March the attorney for the claimant, as he alleges in an affidavit to be found in the record, appeared at the local office for the purpose of moving the dismissal of the contest, but, upon being informed by the contest clerk that it was the practice of the office to take cognizance, *ex proprio motu*, of all defaults, no formal motion was entered, and that "then and there a memorandum was made which was attached to this case, dismissing the same for the reason that contestant had made default." Robert E. Radcliffe, who was at the date in question the contest clerk of the office, makes affidavit to the same effect.

On the 18th of March, 1890, the contestant filed an affidavit, which may be fairly construed as a motion to reinstate the case, and thereafter,

on April 19, 1890, after some irregular proceedings in the local office, the case was re-fixed for hearing on May 28, 1890, and the parties notified. On that day, after hearing, the register and receiver rendered their decision recommending the cancellation of the entry, and your office judgment affirming this decision is now before me for review.

I have been impelled to a somewhat lengthy recital of the history of the case, because of the strenuous contention of counsel for the claimant that, by virtue of the default of the contestant on March 3, 1890, the local office lost jurisdiction of the case. The appeal is pressed with ability and vigor, and the manifest sincerity of counsel in maintaining his assignments of error alone warrants me in giving ample consideration to them here.

The first assignment being reserved for later consideration, and admitting the irregularities alleged in the second and third, as immaterial, and coming to the fourth wherein the local office is charged with error in ordering a new hearing, there being no application for a new hearing on file, I think it sufficient answer to state that trial courts, everywhere, are conceded to have the power to order hearings upon their own motion when the despatch of business, and the orderly proceedings in their courts seem to require it. It is true that the district land offices are not organized as courts in a strictly technical sense, but they are invested with a limited jurisdiction for the adjudication of certain specified property rights, and in the absence of rules specially prescribed for their guidance, I know of no better source to which we may appeal for further instructions than the rules of procedure of the duly organized courts of the country.

The fifth assignment of error complains that there is no proof that either claimant or his attorney was notified thirty days prior to May 28, 1890, that a new hearing was to be had on that day. The decision of the register and receiver recites that both parties were notified of the hearing, through their attorneys, on the same day, and since the record shows that the claimant's attorney appeared at the hearing, and while filing other pleadings, did not present any exception to the hearing for want of notice, it is fair to conclude that notice was served, and if not so, then the defect was unquestionably cured.

The sixth assignment excepts to your conclusion that counsel's appearance of May 28, was a general appearance, and this contention is undoubtedly well founded. Every motion, affidavit, or other pleading, filed by the claimant shows that he intended only to appear for the purpose of attacking the jurisdiction of the local office, but it appears to have been overlooked that on March 26, more than a month before the date of the hearing on May 28, F. J. Mott, the counsel of record for the claimant, filed a formal appearance, without any reservation or qualification as to the character or purpose of that appearance, and I quote it here in full:

APPEARANCE.

MARCH 26, 1890.

To the Hon. REGISTER & RECEIVER,
Denver, Colo.

GENTLEMEN: I hereby enter appearance for Percival N. Rugg in case of contest involving T. C. 11,892, for NE. $\frac{1}{4}$ Sec. 5, Tp. 7 S., R. 67.

Please notify me of all action taken.

Very respectfully,

F. J. MOTT,
Attorney for claimant.

In so far as this assigned error may affect the merits of the controversy, I think it is fully and completely disposed of.

It is alleged, seventh, that the local office erred in holding the entry for cancellation on ex parte testimony. It is true that the testimony was taken ex parte, but only through the wilful laches of claimant's attorney. The record shows that he was present at the hearing, and his failure to exercise his legal right of cross-examination can not be imputed to the contestant. He elected to stand upon his appeal from an interlocutory judgment, and he must abide the issue.

Recurring now to the first assignment, error is charged "in holding that after a default has been made, and upon application of opposing counsel the case has been dismissed, the office has not lost jurisdiction over the party at whose instance the dismissal was made."

If the facts stated in this assignment were true, the conclusion of counsel would be irresistible. Unquestionably, one of the well settled methods of divesting a court of jurisdiction once obtained is to procure the dismissal of the case, but there is nothing in this record to show the dismissal of this case, except the ex parte affidavits of the attorney for the claimant and of a former employé of the office. It does not even appear that there was a seasonable application to the register and receiver for its dismissal, and while it does not escape my attention that the proceedings had before the local officers were reprehensibly irregular, the affidavit and motion of the contestant, filed March 11, asking, practically, for a re-instatement of the case, taken in connection with the general appearance of claimant's attorney on March 26, 1890, are sufficient to cure the defects. This office has never held that a contest is *ipso facto* dismissed by default in the local office, though it appears to be the clear duty of the register and receiver upon their own motion to order dismissal for that cause.

But since that course was not adopted in the case now before me, and since no settled rule has been heretofore established for the direction of the local officers in such cases, I am not disposed to disturb your office finding on that account.

Your office decision is fully justified, also, by the facts in the case. It is shown by several witnesses that the section which embraces the entry in dispute has upon it a natural growth of from thirty-five to fifty acres of substantial timber, measuring in diameter from one foot to two and a half feet.

The judgment of your office is affirmed.

RELINQUISHMENT—DESERT LAND FILING.

JOHNSON *v.* MONTGOMERY.

Irregularities attending the execution of a relinquishment will not affect its validity if it expresses the will and purpose of the party making the same at the time when it is executed and filed.

It is not requisite to the validity of a relinquishment under the act of May 14, 1880, that the signature of the entryman should be acknowledged before an officer.

The relinquishment of an entry is for the benefit of the United States only, and the issue in such case is between the government and the entryman. No third party can acquire any standing as a contestant, intervenor, or otherwise in a controversy about the validity of a relinquishment.

The inadvertent omission of the applicant's signature from a desert land declaratory statement may be supplied by allowing him to sign the same *nunc pro tunc*.

First Assistant Secretary Sims to the Commissioner of the General Land Office, October 5, 1893.

I have considered the case of W. C. Johnson *v.* John Montgomery, Jr., involving desert land entry made by the latter on the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 4, and lot 1, Sec. 5, T. 3 S. R. 35 E., situated in the land district of Blackfoot, Idaho, Boise Meridian.

The record and the testimony show that this entry was made on August 4, 1888, and thereafter, on August 4, 1891, there was filed by John Montgomery, Sr., what purported to be a relinquishment of the entry, and at the same time his own application papers were filed for the entry of the same tract.

On the 6th of August, 1891, and August 28, 1891, Frank W. Bean and William C. Johnson, respectively, filed contests, but the view of the case taken by me renders it unnecessary to state the grounds of these contests, or to discuss their merits.

The validity of the relinquishment by John Montgomery, jr., and of the application of John Montgomery, sr., are the questions to be determined here. The contestant, Johnson, appeals from your office decision holding them valid.

The facts about these two acts are well established and may be simply stated. The two Montgomeries, it may be said *in limine*, are father and son. The entryman had expended on the claim some \$600 or \$800, but being fearful that he would not be able to comply with the law in making his proof, and, as the date for making the proof was approaching, he wrote a relinquishment on the back of his duplicate certificate and placed it in the hands of his father, with authority to change the date and file at the expiration of the three years within which he might make proof. The terms of this act are plain and unequivocal; the testimony shows, without contradiction, that the instrument contained the will of the entryman at the date of its filing, as well as at the date of

its execution, and while there were irregularities attending the execution, I am not prepared on account of these to declare invalid and of no effect an instrument that is clearly shown to express the will and purpose of its executor at the time at which it is sought to be given effect.

The relinquishment was strictly correct in form, was signed by the entryman, and duly witnessed, and the signatures of both entryman and witness were proved at the hearing. It is objected, however, that the relinquishment was not executed in compliance with the requirements of the circular of the General Land Office of May 25, 1880, in that the signature of the claimant was not acknowledged before a competent officer.

Attention is invited to the fact that the act of May 14, 1880, authorizing relinquishments, requires only that they shall be in writing, and the significant omission from general circular issued February 6, 1892, of any exactions beyond those prescribed in the act, indicates a clear purpose to abandon the rule laid down in the circular of May 25, 1880. The latest general circular simply follows the terms of the law, without enlargement, and your office is instructed to conform the practice to that view.

It is to be observed, furthermore, that "relinquishments run to the United States alone," that the issue in such cases is between the government and the entryman, and therefore no third person can acquire any standing, as contestant, intervenor, or otherwise, in a controversy about the validity of a relinquishment. Johnson, in the present case, could have acquired standing only to contest the entry; he can not be heard to question the validity of Montgomery's relinquishment, which is a matter left to the sound discretion of the duly authorized officers of the government.

From the declaration of John Montgomery, Sr., his signature was omitted when filed on August 4, 1891, but it appears from the jurat of the clerk of the district court, before whom the affidavit was made, as also from his testimony, that the omission was at most a mere inadvertence. The clerk and the affiant both swear that they thought the signature was attached in due form, and your office instructions to the register and receiver to permit the applicant to sign his name *nunc pro tunc* seem to have been an equitable disposition of the matter.

The judgment of your office is affirmed.

DESERT LAND ENTRY—SECTION 6, ACT OF MARCH 3, 1891.

JOHN W. HERBERT.

An entryman under the desert land act of 1877, who desires an extension of time under section 6, of the amendatory act of March 3, 1891, should file in the local office a sworn statement of his intention to proceed under said act, showing what has been done by him in regard to the land, and that since he determined to take advantage of the act in question he has complied with the provisions thereof.

First Assistant Secretary Sims to the Commissioner of the General Land Office, October 7, 1893.

I have considered the case of John W. Herbert, on appeal from the action requiring further showing to be made in the matter of his application for time within which to make final proof on his desert land entry for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 13, and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 14, T. 4 N., R. 37 E., Blackfoot land district, Idaho.

Herbert made entry for this land August 19, 1889, under the act of March 3, 1877. His time to make final proof would therefore expire August 19, 1892. On July 6, 1892, he filed in the local office an application as follows:

JULY 6, 1892.

HON. REGISTER AND RECEIVER,
Blackfoot, Idaho,

I hereby apply for the provisions of section 6, act of March 3, 1891, on my D. L. E. No. 1007, dated August 19, 1889, for the W. $\frac{1}{2}$, NW. $\frac{1}{4}$, &c.

JOHN W. HERBERT.

On September 30, 1892, your office addressed a letter to the local officers at Blackfoot, saying:

You will inform the entryman that in order to avail himself of the provisions of the act of March 3, 1891, he will be required to file in your office a sworn statement of his intention to proceed under said act, showing what has been done by him in regard to the land, and that since he determined to take advantage of the act in question, he has complied with the provisions thereof as far as possible.

It was also directed that a map be furnished, showing the contemplated plan of irrigation, &c. On October 5, following the entryman, by his attorney, appealed from said ruling, alleging as error the following:

1st. The requirement is unjust, unreasonable and contrary to the spirit and intent of the law.

2nd. Appellant has already complied with the directions of the Hon. Commissioner, in the matter, as instanced by his letter "G", of March 21, 1891, the undersigned having been furnished a copy by the same of the register, as attorney for Chas. H. Hicks, the party mentioned therein.

In said letter "G", of March 21, 1892, addressed to the Hon. R. & R., Blackfoot, Idaho, the Hon. Commissioner says: "The entryman has a right to take advantage of the law referred to, and all that is necessary to be done, when an application is filed, or an affidavit is made which indicates an intention to submit proof under said act, etc., etc."

Again by letter "G", of April 20, the Hon. Commissioner says: "You are advised that no action on the part of this office is necessary; the privilege is granted the entryman by the act itself, and upon his *filing* a statement of his intention to take advantage thereof, etc., etc."

✓ But after this appeal had been filed, to wit, the 7th of April, 1893, the entryman filed an affidavit, in which he shows that he has purchased a water right of the "Butte" Canal Company, for 80 inches of water, paying \$400 therefor; that he has cut a ditch from the Butte canal to his land, and he furnishes a kind of free-hand sketch, showing that his ditch runs diagonally across the land in question, with four lateral ditches for distribution; but he says the Butte Company could not get water to him in time to make proof within three years; he says he has had thirty acres of the land broken at a cost of \$4.00 per acre. He asks to be allowed, under section 6, of the act of March 3, 1891, until August 19, 1893, in which to make proof.

The 4th section of said act of March 3, 1891, requires the entryman at the date of application to also file "a map of the land, which shall exhibit a plan showing the mode of contemplated irrigation." It must also show the source of water to be used. Several persons owning separate tracts may join in constructing canals and ditches, and file a joint map.

The 5th section provides for the expenditure of not less than \$1.00 per acre each year, on the land, until he shall have expended \$3.00 per acre in water rights, improvements, ditches, etc., and it requires that *each year* the party file with the register, proof by the affidavits of two or more credible witnesses, that he has expended \$1.00 per acre, and the manner in which it was expended, and a failure to file such testimony works a forfeiture of the entry and the twenty-five cents per acre paid to the government. At the end of the third year, he shall file a map or plan showing the character and extent of his improvements, ditches, etc.

The 6th section of the act reserves any valid right that had theretofore accrued under the former statute, and allows parties to continue under the old law, making proof within three years, or where a claim had been initiated under the old law, the claimant could, by complying as far as possible with this later act, have the benefit of four years. If, for example, the entry had been made without furnishing any plan of irrigation, or no evidence had been filed showing the expenditure of any money during the first or second or third years, a reasonable time would be allowed to prepare and file a map and the required proof, as under the latter act.

The affidavit of Herbert is corroborated by only one witness, and the map filed is very incomplete; it shows Snake river, and a line or mark for "Butte" canal, and a line or mark for the branch ditch leading to the land in question, but the map is not drawn to any scale, and no distances are given, or section lines, nor is the width of "Butte" canal given, or that of the lateral leading to the land.

The spirit and intent of the law was to allow persons to go upon arid land and irrigate it by artificial means, and the provisions and requirements of the law are mandatory as to filing plan of irrigation, and proof of expenditure of money, in improvements, water rights, etc., and a map at the end of the third year, showing the character and extent of improvements.

In the case at bar, the entryman shows \$600 expended on two hundred acres of land, and he testifies to his ditches and laterals; the map is very incomplete, giving little or no information, but the entryman has evidently acted in good faith, and if he complies with the law and files with his final proof, satisfactory evidence of having complied with the law, with a map showing the character and extent of his improvements, there being no protest or adverse claim, his proof will be considered, as under the act of March 3, 1891. The ruling laid down in said letter of September 30, 1892, is approved.

TIMBER CULTURE ENTRY—PUBLICATION OF NOTICE.

BROX *v.* TOBIAS.

A timber culture entry allowed on a preliminary affidavit executed outside of the district and State in which the land is situated, is not void, but voidable, and may be amended in the absence of an adverse claim.

Jurisdiction is not acquired by the local office through publication of notice until the end of the period of publication, and an order of the General Land Office, made before the expiration of said period, allowing an amendment of the entry involved, prevents the acquisition of jurisdiction by the local office.

First Assistant Secretary Sims to the Commissioner of the General Land Office, October 5, 1893.

I have considered the case of Solomon Brox *v.* George W. Tobias, involving the latter's timber-culture entry, made December 12, 1889, for the SE. $\frac{1}{4}$ of Sec. 1, T. 30 N., R. 14 W., O'Neill, Nebraska, on appeal by Tobias from your office decision of May 23, 1892, holding said entry for cancellation.

It appears that this land was formerly embraced in timber-culture entry No. 1934, by Arthur E. Pickle, made June 14, 1880, against which Fred T. Conkling filed a contest, which was decided against the contestant by this Department February 11, 1889.

In 1886 Tobias filed a contest against said entry by Pickle, which was held to await the result of Conkling's contest, and with said contest he filed an application and affidavit to make entry of the land. Upon the determination of Conkling's contest, Tobias was regularly advised, and hearing was set upon his contest.

Before the hearing his father, who was acting for him, secured Pickle's relinquishment, and it appears he was advised, by the then receiver,

that his son had better make a new application to enter, such a long time having elapsed since the making of the first.

At this time the present claimant was residing in Illinois, and his father swears that he was advised by the receiver that his son might make the affidavit in the State of Illinois before any clerk of the court. Acting upon this advice, he forwarded the application and affidavit to his son, who executed the same before a clerk of the court and returned them to him. He, the father, then entered a dismissal of the contest, and filed Pickle's relinquishment, accompanied by his son's application, which was accepted and went of record on December 12, 1889, as before stated, since which time, so far as shown, he has complied with the law, expending several hundred dollars on the land.

On November 20, 1890, the contestant filed his contest against said entry, alleging among other things, that

said entry is illegal and was illegal at its inception and date thereof, and was erroneously allowed in that the affidavit required by section 2, act of June 14, 1878, was subscribed and sworn to outside of the O'Neill land district, the district within which the land is situated, the same being executed before Francis G. Miner, clerk of the circuit court in and for the county of Peoria, State of Illinois, on the 19th day of September, 1889.

Notice of said contest was given publication, the published notice running from November 20, 1890, to December 25, 1890, the hearing being set for December 30, 1890.

Attention having been called to the fact that the affidavit was executed outside of the land district in which the land lies, by letter of December 20, 1890, addressed to the local officers, they were directed to call upon Tobias to file a supplemental affidavit, properly executed, which was accordingly done, so it is claimed, although the same is not among the papers forwarded on appeal.

It is clearly shown that Tobias has, in the matter of the entry of this land, acted in entire good faith, and that the defect in his entry was the result of bad advice. It has been repeatedly held that such an entry is not void, but voidable, and may be amended, except in the presence of an adverse claim.

By letter of December 20, 1890, your office directed that the amendment be allowed, and the sole question for consideration is, had Brox at that time such an adverse claim as would defeat the amendment?

It has been repeatedly held that the entryman's good faith may be properly considered in a contest, and that the contest must fail, if the default charged is cured before service of the notice.

In this case, the notice having been given by publication can not be considered as conferring jurisdiction upon the local officers, for it is by the notice that jurisdiction is acquired, until the end of the period of publication, and, as at least thirty days notice must be given, I must hold, in view of all the circumstances surrounding this case, that the action of your office on December 20, 1890, in directing that Tobias be allowed to file a new affidavit, prevented the local officers from acquiring

jurisdiction under said contest, and that the subsequent proceedings had thereunder must be dismissed, as the entryman, acting under your office directions, made proper affidavit, in due time completing his entry.

Other charges were made in the affidavit of contest, but were not relied on, nor attempted to be sustained at the hearing. The charge relied upon merely asserted what the records showed, and, as no rights had been acquired under said contest prior to December 30, 1890, your office action under that date, allowing the claimant to file a supplemental affidavit, was an assertion of jurisdiction in the premises that prevented the acquirement of any rights under said contest.

I must therefore reverse your office decision, and direct that contest be dismissed and claimant's entry permitted to stand, subject to compliance with law.

OKLAHOMA LANDS—SETTLEMENT—DEATH OF CONTESTANT.

SULLIVAN *v.* McPEEK.

One who is within the territory of Oklahoma after the passage of the act of March 2, 1889, opening the same to settlement, and subsequently goes outside of the boundaries thereof, and there remains until the time fixed by the President's proclamation for entering the same, but takes advantage of his former presence therein, either through his own knowledge of the lands subject to settlement, or by collusion with another, to secure a tract in advance of others is thereby disqualified as a settler under said act.

Under section 2, act of July 26, 1892, the heirs of a contestant, if citizens of the United States, are entitled to continue the prosecution of a contest, in the event of the contestant's death before the final termination of the suit.

First Assistant Secretary Sims to the Commissioner of the General Land Office, October 14, 1893.

I have considered the appeal in this case, involving lots 1 and 2, and the S $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 6, T. 18 N., R. 3 W., Guthrie, Oklahoma Territory.

The record shows that on April 23, 1889, George S. McPeek made a homestead entry of said land, and on May 28, following, Timothy B. Sullivan instituted contest proceedings against said entry, alleging prior settlement and improvement of the land, and that McPeek did not make his entry until after he (Sullivan) had settled upon the claim. Subsequently, Sullivan filed supplemental affidavits of contest, alleging that McPeek did not make his entry in his proper name; that said name is an alias and used by him for purposes of fraud and deception, and that McPeek was not a qualified entryman by reason of having violated the act of Congress and the President's proclamation by entering upon Oklahoma lands prior to the time prescribed.

A hearing was held, both parties being present with their witnesses,

and on October 31, 1890, after devoting some twenty days or more to the taking of testimony, the case was finally submitted.

Under date of March 12, 1891, the local officers decided in favor of the plaintiff, recommending the cancellation of the entry in question, and that the plaintiff be awarded a preference right of entry, whereupon the defendant appealed and, under date of March 31, 1892, your office affirmed the decision below, when the defendant filed a motion for review of your office decision.

On June 11, 1892, said motion was denied by your office, whereupon the defendant appealed from said decision of March 31, 1892, alleging substantially as error that the decision is contrary to law and the evidence adduced in the case.

Three questions appear in this case:

- 1st. That of priority of settlement;
- 2d. That the entry was made under a fictitious name, and
- 3d. That the defendant had violated the law and the President's proclamation opening the Oklahoma Territory to settlement.

The testimony submitted herein is very voluminous and in many respects conflicting and uncertain.

As regards priority of settlement the testimony is not clear, and in view of the fact that the burden of proof rests upon the plaintiff to prove his claim of priority, I do not think this has been done.

The claim that the entry was made under a fictitious name, appears to have been almost lost sight of in this contest and is not sustained by the evidence.

The question of the violation of the statute and the President's proclamation, however, is a much more serious one.

It is well understood that the act of March 2, 1889 (25 Stats., 939), prohibited persons from entering upon and occupying lands in Oklahoma until opened for settlement by proclamation of the President.

In accordance with said act the President issued his proclamation appointing 12 o'clock m., on April 22, 1889, as the time when said lands were to be opened for entry.

The evidence shows that defendant from March 1, to 15, 1889, was in the employ of a cattle company guarding cattle in Oklahoma Territory, not far from the land in question; that on March 15, 1889, he left Oklahoma and traveled eastward, about one hundred and thirty miles or more, to a place in the Cherokee country, where he remained until April 15, following, when he started with other persons for Oklahoma, arriving there on the line of said Territory nearest the land in question on the 19th of April, and went into camp. On the evening of the same day a brother of the defendant, Thos. J. McPeck, who had also been guarding cattle in the Territory for the same cattle company, joined the defendant at the camp, where they claim they both remained until 12 o'clock m., on April 22, and then on horseback made the run directly to the land in question.

Although there is a conflict in the evidence as to whether the defendant was in Oklahoma on the 19th, 20th or 21st of April, 1889, as testified to by witnesses for the plaintiff, yet, there is no contradiction of the fact that the defendant was employed in the Territory from March 1, to 15, and therefore was fourteen days within said Territory after the passage of the act of March 2, 1889 (*supra*). Again, from the fact that the brother of the defendant remained encamped in Oklahoma until April 19, and then meeting the defendant and his comrades north of the Territory on the exact day of his arrival from the east, and that they both, together, made the ride direct to the land in question, all lead to the conclusion that the meeting was pre-arranged and that if the land in question had not been selected by the defendant previous to the opening of the Territory, it was selected for him by his brother and the nearest route to it adopted. In either case, the disqualification is the same. *Blanchard v. White et al.* (13 L. D., 66).

After a careful consideration of the record in this case, I am of the opinion that the defendant was not qualified to enter any portion of the public land in Oklahoma Territory under the homestead law, and therefore your decision is affirmed.

Recently, counsel for plaintiff filed in this Department a motion suggesting the death of the plaintiff, and moved that the heirs of said plaintiff be substituted instead of the plaintiff in this case.

The second section of the act of July 26, 1892 (27 Stats., 270), provides that in case of the decease of a contestant before the final termination of the contest, the heirs who are citizens of the United States, may continue the prosecution and shall be entitled to the same rights as the contestant would have had, if his death had not occurred.

As it appears that the heirs of said plaintiff, Sullivan, are citizens of the United States the substitution is so ordered.

RAILROAD GRANT—INDEMNITY SELECTIONS.

NORTHERN PACIFIC R. R. CO.

Indemnity selections of land in the State of Washington can not be made by the Northern Pacific for losses in the State of Idaho, until it is first shown that such losses can not be satisfied from lands within the limits of the grant in Idaho.

Secretary Smith to the Commissioner of the General Land Office, October 14, 1893.

I have considered the appeal by the Northern Pacific Railroad Company from your office decision of June 17, 1892, holding for cancellation its indemnity list of selections, filed in the local office at North Yakima, Washington, on October 11, 1888 (said list being numbered 16), for the reason that the losses are not arranged tract for tract with the selected lands.

There can be no question but that the decisions of this Department require that the losses must be stated tract for tract with the selected lands, in no case exceeding a section. (See 11 L. D., 428; 13 id., 349, and 440; 15 id., 529.) Were there no other objection to the list, however, a re-arrangement of the losses might be allowed.

From an examination of the list, it appears that the lands selected are located along and to the north of the branch line of said road in the State of Washington, and consist of two hundred and twenty items, containing from forty to one hundred and sixty acres each, aggregating 21,102.20 acres.

The losses designated are a part of the Coeur d'Alene Indian Reservation, in the State of Idaho, unsurveyed, the area given being estimated at 21,120 acres.

It may be questioned whether unsurveyed lands can be made the basis for an indemnity selection; but in the present case it is unnecessary to consider that question, as a more important one presents itself—viz: Can this company select lands as indemnity in the State of Washington for a loss within the State of Idaho, without first showing that such loss can not be satisfied from the lands within the limits of the grant in that State?

It is a well settled principle, carried through all the legislation pertaining to land grants to aid in the construction of railroads, that indemnity lands must be taken nearest to the lost lands, so that the portion of the country benefited by the building of the road may bear the burden of the grant made to aid in its construction. The coterminous principle, applied to nearly all the grants, was evidently intended to accomplish this result. Were it otherwise, the company might also pass over the bad lands within the limits of its grant and pick out the best lands, which it has evidently done in the present case, if the loss named can be satisfied within the limits of its grant in the State of Idaho.

The joint resolution of May 31, 1870 (16 Stat., 379), provides for a second indemnity belt from which to satisfy certain losses that can not be satisfied in that State or Territory, within the first indemnity belt, at the time of the final location of the road. Said resolution provides:

And in the event of there not being in any State or Territory in which the said main line or branch may be located at the time of the final location thereof, *the amount of land per mile granted by Congress to said company within the limits prescribed by its charter, then said company shall be entitled under the directions of the Secretary of the Interior to receive so many sections of land belonging to the United States and designated by odd numbers in such State or Territory, within ten miles on each side of said road beyond the limits prescribed in said charter, as will make up such deficiency on said main line or branch, except mineral or other lands as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, subsequent to the passage of the act of July 2, 1864.*

The Coeur d'Alene Indian reservation was created by executive order of June 14, 1867, subsequent to the date of the act making this grant

(July 2, 1864, 13 Stat., 365), and prior to the final location of the road in this vicinity (August 30, 1881), thus being of the special character of losses provided for by said resolution.

If necessity exists therefor, this loss might be made the basis for selection within the second indemnity belt in the State of Idaho.

There has been no attempt made, as far as known to me, to secure the laying down of an additional indemnity limit in the State of Idaho, so it is fair to presume that no necessity exists therefor, and that all losses within the limits of its grant in the State of Idaho can be satisfied from the first indemnity belt, within the boundaries of that State. This being so, I am of the opinion that selections can not properly be made in another State in lieu of losses in the State of Idaho, until it is first shown that such losses can not be satisfied from lands within the limits of its grant in that State.

This is no wise in conflict with the opinion of the Honorable Attorney General of January 17, 1883 (8 L. D., 13), as the question therein considered was whether, under any circumstances, selections might be made within the first indemnity belt for losses outside the particular State or Territory in which the same occur—in other words, whether the indemnity privilege is *limited* to the satisfaction of losses occurring in the State or Territory in which the selection is sought to be made.

For the reasons herein given, I sustain your action rejecting this list and direct its cancellation.

RAILROAD GRANT—INDEMNITY SELECTIONS—REVISED LISTS.

LA BAR *v.* NORTHERN PACIFIC R. R. Co.

Lands included within pending railroad indemnity selections are not restored to the public domain by an order revoking the indemnity withdrawal.

The substitution of an amended list of indemnity selections on a specification of losses different from that assigned in the first, and where the losses in neither list are arranged tract for tract, must be treated as an abandonment of the first.

A settlement made on a tract released from indemnity withdrawal but subject to a pending selection takes effect at once upon the abandonment of said selection, and precludes the subsequent selection of said land on account of the grant.

The Commissioner of the General Land Office directed to call on all railroad companies having pending indemnity selections to revise their lists within six months from the date of such call, so that a proper basis will be shown for each and all lands now claimed as indemnity, the same to be arranged tract for tract, in accordance with departmental requirements; informing said companies that all tracts formerly claimed, for which a particular basis has not been assigned in the manner prescribed, at the expiration of said period, will be disposed of under the terms of the orders restoring indemnity lands without regard to such previous claim.

The requirements of the order of August 4, 1885, must also be enforced, and the companies required to specify a basis not only for pending selections, but for all selections heretofore approved on account of which no previous loss has been assigned.

Secretary Smith to the Commissioner of the General Land Office, October 14, 1893.

I have considered the motion filed on behalf of La Bar, in the case of Edward G. La Bar *v.* Northern Pacific Railroad Company, involving the SW. $\frac{1}{4}$ of Sec. 7, T. 146 N., R. 50 W., Fargo Land district, North Dakota, for the review of departmental decision of March 12, 1892, denying his application to enter said tract.

The land in question is within the indemnity limits of the grant for said company and was embraced in the list of selections filed March 19, 1883.

The order of withdrawal of indemnity lands on account of this grant was revoked August 15, 1887, and La Bar's claim is based upon a settlement begun on October 1, following said revocation.

The motion urges that by said revocation all indemnity lands not embraced in approved selections were opened to entry, thus setting aside all pending selections; further, that by assigning a new loss for the selection in question, after the settlement by La Bar, the land became subject to his claim, it being an intervening right.

In revoking the previous orders of withdrawal of indemnity lands, it was directed, in the matter of those tracts covered by unapproved selections, that whenever an application is tendered covering any such tract alleging upon sufficient *prima facie* showing that the land is from any cause not subject to the company's right of selection, notice should be given the company, and in the event of its filing objections to the allowance of such application, a hearing was authorized as in other cases made and provided.

See case of Atlantic and Pacific R. R. Co. (6 L. D., 91).

In the case of Dinwiddie *v.* Florida Railway and Navigation Company (9 L. D., 74), it was held that lands included within pending selections were not restored to the public domain by the revocation of the indemnity withdrawal.

It is plain then that this tract was not restored by the order of August 15, 1887, for the reason that the selection of March 19, 1883, was then pending, but under the terms of the order of restoration was subject to attack for any sufficient reason affecting its legality.

It might be here remarked that to attack the selection it might be necessary to know upon what particular loss such selection rested, or was based.

The list of March 19, 1883, contained a designation of losses as a basis for the selection made thereby, but such losses while in the aggregate equaling the selected lands is not a specific designation, that is, tract for tract with the selected lands. It was therefore error to state in the decision of March 12, 1892, that the tract in question was selected on account of any given tract.

It so happened that all of Sec. 7, T. 146 N., R. 50 W., was selected, and immediately opposite thereto in the loss column was given all of

Sec. 23, T. 47 N., R. 19 W., Minnesota. This was a mere coincidence for, at the end of the list of selections, embracing 438,983.48 acres, the losses stated opposite thereto amounted to only 248,652.97 acres; then follows twenty pages of losses necessary to bring the total area to equal the selected lands.

On October 12, 1887, an amended list was filed in the local office and transmitted to your office. The list contains 7900.78 acres less than the list of 1883, and the losses are correspondingly reduced.

In this connection I will state that an examination of the two lists show that different losses are substituted in the second list, and like the first list the losses are not arranged tract for tract with the selected lands.

The question arises then what is the effect of the filing of this second list upon claims attaching prior to the filing of the same?

It is plain that it was intended as a substitute or amendment of the old list, and on account of its variance therefrom must be treated as an abandonment of the old list, for the company cannot stand on two lists specifying different losses as a basis therefor.

It may be urged that such variance is but slight, that is, that the losses are the same with the exception of a few thousand acres, but, as neither list is arranged tract for tract, it cannot be said to which tracts the variance applies.

When La Bar settled on October 1, 1887, he settled subject only to the selection of 1883, which having been abandoned removes any bar against his settlement.

A point of time must elapse between the substitution of the lists, and La Bar being a settler, his rights attach upon that instant and bar subsequent selection on account of the grant.

In this connection I can but note the looseness permitted in the selection of these indemnity lands.

The indemnity withdrawals have been revoked but the restoration ordered does not apply as before shown, to lands covered by pending selections.

To anticipate and defeat the order as far as possible selection has been made in some form or other of every available tract within the indemnity limits, thus, in effect, continuing the withdrawal.

To a proper adjustment of these grants it is necessary to ascertain on account of what lands lost to the grant these pending selections are claimed, and all lands not properly claimed should no longer be reserved on account of such grants.

Prior to the year 1879 it seems to have been the practice, due to the peculiar rulings in the matter of railroad grants then prevailing, to allow the selection of indemnity lands without a specification of the losses on account of which such selections were claimed.

Since the circular of November 7, 1879, however, it has been uniformly required that the losses be specified, except in the case of the Northern

Pacific grant, which was excepted from such requirement by departmental order of May 28, 1883 (12 L. D., 196), under the belief that such course would aid a speedy adjustment, and secure an early restoration of those lands not needed.

It failed to accomplish that result and by the circular of August 4, 1885 (4 L. D., 90), it was directed that no further selections be allowed by any railroad company until losses had been specified for all previous selections. I learn that under these several orders selections have been made, in some instances without specifying a basis, and again with the losses indiscriminately assigned without regard to the selected tracts, otherwise than that in the aggregate the area agreed.

In the case of the Northern Pacific R. R. Co. *v.* John O. Miller (on review, 11 L. D., 428), it was held that the basis for an indemnity selection must be specifically designated and the rights of settlers can only be ascertained and protected by the enforcement of such a rule. Since said decision it has been repeatedly ruled that the losses must be specifically designated.

In the case of the Florida Central and Peninsular R. R. Co. (15 L. D., 529), the several decisions of this Department in the matter of the selection of indemnity lands under railroad land grants were reviewed, and it was held that each loss must be specified and the selection made on account thereof designated, in no case exceeding a section, the difference in area approximating the smallest legal subdivision.

In this way each selection stands by itself, and in the event of the failure of the basis in any instance, the selection dependent thereon is readily ascertainable.

I learn that several companies have been called upon to revise their lists to conform with the rulings of this Department and that re-arranged lists have been filed from time to time covering certain lands for which patents were immediately desired, but no general rule seems to have been issued, and if the lists were to be now acted upon it could not be said on what particular loss any tract depended.

In the present case, after the many rulings of this Department in the premises it cannot be said on what particular loss the selection in question depends.

When indemnity lists are submitted for the approval of this Department, it is required that the losses be specifically designated in the clear list submitted as the basis of patents to be issued to the companies.

In such cases it has been the practice, so I learn, for your office to re-arrange the lists so as to meet the requirements, where such duty had not been performed by the companies.

This only tends to complicate the matter as is shown in the lists in question. From the lists embracing the land in question a clear list has been prepared by your office which was approved March 30, 1891, and since patented.

Part of the selected tracts have been patented and part of the bases assigned in the list approved; many selections have been canceled, and it would require much time to unravel this list so as to ascertain which of the selections are now pending, and on what basis they stand.

It would seem that there is necessity for some positive action in the premises. Aside from the legal aspect of the case and the protection of the rights of adverse claimants, it will greatly facilitate the work of the adjustment of these grants, to exact compliance with the regulations heretofore prescribed in the matter of the selection of indemnity lands.

I have, therefore, to direct that you call upon all railroad companies having pending indemnity selections to revise their lists within six months from the date of your order, so that a proper basis will be shown for each and all lands now claimed as indemnity, the same to be arranged tract for tract in accordance with departmental requirements, and that all tracts formerly claimed for which a particular basis has not been assigned in the manner prescribed, at the expiration of said six months, be disposed of under the terms of the orders restoring indemnity lands without regard to such previous claim.

The requirements of the order of August 4, 1885, should also be enforced, and the companies should be required to specify a basis not only for the selections now pending, but for all selections heretofore approved on account of which no previous loss has been assigned.

This is as necessary to the protection of the interests of the United States, and as an aid in the adjustment of the grants, as the requirement of a specification of losses for pending selections, for without such designation on account of approved selections, it cannot be ascertained whether a particular loss now assigned has not already been fully satisfied by previous approvals.

To bind the companies they must make their own selections, which necessitates the statement of a basis on which such selections rest, and while they are to be made under the direction of the Secretary of the Interior, it is not contemplated that the work is thereby transferred and added to the duties of your office.

The regulations in the matter of the selection of indemnity lands must therefore be strictly enforced, and if the losses assigned for previous approvals are carefully examined to the end that a good basis is shown to exist for each tract heretofore received as indemnity, and are not duplicated in the losses assigned for pending selections, the grants will practically adjust themselves.

As to the land applied for by La Bar, having held that the Northern Pacific Railroad company abandoned its selection list of 1883 by filing the list of October 12, 1887, it follows that the previous decision denying La Bar's rights must be and is accordingly recalled and vacated, and he will be permitted to make entry of the land in question as before applied for, and the selection of October 12, 1887, will be canceled as to the land involved.

COAL LANDS—DECLARATORY STATEMENT.

JOHNSON ET AL. v. STATE OF SOUTH DAKOTA.

An application by an agent of an association to file a coal declaratory statement must be made in the manner provided by the departmental regulations, and show what improvements have been made, and the qualifications of the persons composing the association.

First Assistant Secretary Sims to the Commissioner of the General Land Office, October 16, 1893.

I have considered the appeal by Carl Johnson *et al.* from your decision of July 23, 1892, sustaining the action of the local officers in rejecting an application made in their behalf to file a declaratory statement under section 2348 of the Revised Statutes, for section 36, township 96 north, range 53 W., Yankton land district, South Dakota.

Said application was tendered on February 10, 1892, by Carl Johnson, as agent, and rejected "for the reason that it does not state what improvements have been placed on the land, if any, nor the value of such improvements, and the declaratory statement is imperfect in other respects."

In sustaining said rejection, your office assigns the following additional objections, viz:

1st. Said declaratory statement was not made by declarants as required by paragraph 34 of regulations under coal land laws, but by an agent.

2d. Said declaratory statement was not sworn to.

3d. That the land had passed to the State as school lands prior to the filing of said declaration, the same being of the number granted to the State by the act of February 22, 1889, and returned by the surveyor-general as agricultural lands.

4th. That said declarants had no right to declare upon more than three hundred and twenty acres, without showing \$5000 worth of improvements.

Section 2348 of the Revised Statutes is as follows:

Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved: *Provided*, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

It is apparent that said section requires, as a condition precedent to the right to file a declaration for coal lands, that some improvement had been made thereon, and that at least \$5000 had been expended before six hundred and forty acres could be entered; further, that the qualifications of the person or association of persons should be shown.

Rule 34 of the regulations, approved July 31, 1882 (1 L. D., 692), is as follows:

Any party duly qualified under the law, *after swearing* to his application or declaratory statement, may, by a sufficient power of attorney, duly executed under the laws of the State or Territory in which such party may then be residing, empower an agent to file with the register of the proper land office the application, declaratory statement, or affidavit required at the time of actual purchase, and also authorize him to make payment for and entry of the land in the name of such qualified party; and when such power of attorney shall have been filed in your office you will permit such agent to act thereunder as above indicated.

These regulations are made under the authority of section 2351 of the Revised Statutes, and the application not being in conformity therewith, nor disclosing facts necessary to entitle the declarants to the right to file as applied for, must be rejected. The fact that this is an application to re-file is immaterial.

With these views, it is unnecessary to pass upon the right of the State to this section at this time, although due appearance has been made in behalf of the State and an argument filed in support of its claimed rights in the premises.

Your office decision is affirmed.

CONTESTANT—RELINQUISHMENT—SETTLEMENT RIGHT.

CULLINS *v.* LEONARD.

A contestant who, pending his contest, purchases a relinquishment of the contested entry and files the same, does not thereby acquire the status of a successful contestant; and the right of a settler, who is then residing on the land, will take effect at once on the filing of the relinquishment and exclude the claim of the contestant.

First Assistant Secretary Sims to the Commissioner of the General Land Office, October 16, 1893.

This is an appeal by Thomas P. Leonard from your office decision dated March 25, 1892, in the case of John D. Cullins *v.* said Leonard, involving the NW. $\frac{1}{4}$, Sec. 28, T. 8 S., R. 39 W., Oberlin, Kansas.

The record history of the case is fully stated in said decision and need not be repeated in detail.

It thus appears that the land had been embraced in the homestead entry of E. M. Pentz, dated July 25, 1885; that on September 9, 1886, Leonard filed contest against said entry alleging abandonment; that prior to the time January 14, 1887, to which the hearing on Leonard's contest had been continued, Cullins on December 16, 1886, filed a contest subject to that of Leonard against the Pentz entry; that pending a rehearing ordered in the case of Leonard *v.* Pentz, Cullins filed an application for a hearing charging that Leonard's contest was fraudulent and speculative; that still pending the said re-hearing (set for

November 22, 1889) Leonard presented November 2, 1889, Pentz's relinquishment acknowledged August 2, 1887 of his said entry; that same day, to wit, November 2, 1889, Pentz's entry was canceled on said relinquishment and Leonard made timber-culture entry for the land; that November 22, 1889, Cullins made homestead application for the same which was rejected by the local office for conflict with Leonard's entry; that December 20, 1889, Cullins filed his application for hearing, alleging that he had resided on the land with his family since March, 1887, and placed valuable improvements thereon and that Leonard's contest was fraudulent and for the purpose of sale and speculation, and that by letter "H" dated February 24, 1890, your office directed a hearing upon Cullins' said application.

The hearing thus ordered was had after continuance at the local office in May, 1890. The register and receiver found that Leonard's entry should remain intact and that Cullins' contest should be dismissed.

On appeal by Cullins your office reversed this ruling and by your said office decision of March 25, 1892, held Leonard's entry for cancellation.

From this judgment Leonard has taken the pending appeal.

Your office finds that Leonard bought Pentz' relinquishment in August, 1887; that he held the same in his possession during the pendency of his contest against Pentz' entry and frequently offered the same for sale, and your office accordingly finds that Leonard's contest is speculative and that his entry must be canceled.

Leonard, who had exhausted his other rights, testifies that in consideration of \$40, he obtained in August, 1887, Pentz' relinquishment for the purpose of making a timber-culture entry of the land.

The NE. $\frac{1}{4}$ of said section was embraced in a timber-culture entry made by one Copeland in February, 1886. Leonard induced Copeland to relinquish this entry and the same was canceled November 2, 1889. Thereupon Leonard, as hereinbefore stated, on the same day and shortly before the hearing on his contest against the Pentz entry, made the entry here in question.

It thus appears that Pentz' relinquishment was induced by Leonard's purchase and not by his contest, and that his (Pentz') entry was canceled upon said relinquishment and not as a result of said contest.

The second section of the act of May 14, 1880, gives a preference right of entry to any person who "has contested, paid the land office fees and procured the cancellation" of an entry." To secure such a preference right a person must therefore successfully prosecute his contest and thereby procure the cancellation of the entry embracing the land he seeks to enter. This Leonard has not done. For he elected to buy the relinquishment and to procure the cancellation of Pentz' entry by its use, rather than await the termination of his contest against said entry. Aside, therefore, from the *bona fides*

of Leonard's contest, it follows that he did not acquire the preference right of entry accorded to successful contestants by the act of May 14, 1980, *supra*. Consequently, the settlement right of Cullins, who is shown by the evidence to have resided upon and improved the land since the spring of 1887, took effect instantly upon the cancellation of Pentz' entry. *Pool v. Moloughney* (11 L. D., 197) and must prevail over the entry of Leonard.

Cullins, if in other respects qualified, will be permitted to enter the land and the entry of Leonard will be canceled.

The decision appealed from is affirmed.

OKLAHOMA LANDS—SETTLEMENT RIGHTS.

TURNER v. CARTWRIGHT.

One who is within the Territory of Oklahoma at noon on April 22, 1889, is by his presence in said Territory disqualified to thereafter enter lands therein. The case of *Taft v. Chapin*, 14 L. D., 593, overruled.

First Assistant Secretary Sims to the Commissioner of the General Land Office, October 17, 1893.

This case involves the NE. $\frac{1}{4}$, Sec. 17, T. 12 N., R. 4 W., I. M., Oklahoma City land district, Oklahoma Territory.

The record shows that John P. Cartwright made homestead entry for the above described tract on the 23d day of May, 1889.

On June 26, 1889, Edgar Turner filed an affidavit of contest, alleging a prior settlement by himself.

On June 5, 1890, both parties appeared in person and by attorneys, and the testimony in the case was taken.

December 22, 1890, the register and receiver rendered their joint opinion wherein they dismissed the contest of Turner and allowed the claim of Cartwright to remain intact.

Upon proper appeal being made, your office, on March 19, 1892, sustained the decision of the local officers. On May 19, 1892, Turner appealed to this Department.

It is in evidence that Edgar Turner went into Oklahoma Territory in July, 1886, and from that time until March, 1887, worked on a ranch; subsequently, for a period of years as a teamster, and afterwards was in the employ of the Star Mail and Stage Company, returning, after his engagement with the mail company had expired, to his original occupation as a teamster, with one Bickford, with whom he remained until April 22, 1889, upon which day he was inside the Territory, south of the North Fork of the Canadian River, and from four to six miles east of Fort Reno. These facts are shown by Turner's testimony. In the afternoon of the last-named date, sometime after five o'clock, he settled upon the land in controversy and made acts of settlement. That he was the

first of the parties herein to settle, is shown by the evidence, and the only question that the case presents is whether his presence in the Territory up to and including the 22d day of April, disqualified him from making a homestead entry therein.

There is conflicting evidence as to whether Turner took advantage of his presence in the Territory, but in view of the facts hereinbefore set out and the law to be applied thereto, a determination upon this question becomes immaterial.

The acts of Congress which opened the Oklahoma lands to settlement were those of March 1, and 2, 1889, together with the proclamation of the President of March 23, 1889. The act of March 1, 1889 (25 Stat., 757-759), contains in the second section the following:

That the lands acquired by the United States under said agreement shall be a part of the public domain, but they shall only be disposed of in accordance with the laws regulating homestead entries, and to the persons qualified to make such homestead entries, not exceeding one hundred and sixty acres to one qualified claimant. And the provisions of section twenty-three hundred and one of the Revised Statutes of the United States shall not apply to any lands acquired under said agreement. Any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are opened to settlement by act of Congress shall not be permitted to occupy or to make entry of such lands or lay any claim thereto, and the act of March 2, 1889 (25 Stat., 980), adds,

And provided further, That each entry shall be in square form as nearly as practicable and no person be permitted to enter more than one quarter section thereof, but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto.

The President by his proclamation aforesaid, also stated:

Warning is hereby again expressly given, that no person entering upon and occupying said lands before said hour of twelve o'clock, noon, of the twenty-second day of April, A. D., eighteen hundred and eighty-nine, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto; and that the officers of the United States will be required to strictly enforce the provision of the act of Congress to the above effect.

These several acts must be construed in the light of the object Congress had in view in making them. This has been done by the supreme court in the case of *Smith v. Townsend* (148 U. S. Reports, page 490).

Justice Brewer in delivering the opinion of the court discusses at length the object and purpose of Congress and the ills it proposed to cure:

The evident intent of Congress was by this legislation, to put a wall around this entire Territory, and disqualify from the right to acquire under the homestead law any tract within its limits, every one who was not outside of that wall on April 22, when the hour came the wall was thrown down, and it was a race between all outside for the various tracts they might desire to take to themselves as homesteads.

In the case at bar it is maintained that the plaintiff was rightfully within the Territory; upon this point Justice Brewer, in the above-mentioned case, says:

But it is said that the appellant was rightfully on the railroad company's right of way; that he had the express sanction of Congress to be there; and that when the hour of noon of April 22 arrived he had, as an American citizen, possessing the qualifications named in the homestead laws, the right to enter upon any tract within the Territory for the purpose of making it his homestead. While he may have had all the qualifications prescribed by the general homestead law, he did not have the qualifications prescribed by this statute; and there is nothing to prevent Congress, when it opens a particular tract for occupation, from placing additional qualifications on those who shall be permitted to take any portion thereof. That is what Congress did in this case. It must be presumed to have known the fact that on this right of way were many persons properly and legally there; it must also have known that many other persons were rightfully in the Territory—Indian agents, deputy marshals, mail carriers and many others; and if it intended that these parties, thus rightfully within the Territory on the day named, should have special advantage in the entry of tracts they desired for occupancy, it would have been very easy to have said so. The general language used in these sections indicates that it was the intent to make the disqualifications universally absolute. It does not say "any person who may wrongfully enter," etc., but "any person who may enter"—"rightfully or wrongfully" is implied.

In *Donnell v. Kittrell* (15 L. D., 580), and *Golden v. Cole heirs* (16 L. D., 375), it was held that one who has entered, by mistake, and who went outside on discovering that he had crossed the line, was not disqualified from making homestead entry; and in the case of *Standley v. Jones* (16 L. D., 253) the Department took yet another step, and held that one who was within the Territory knowingly, but subsequently went outside and was not in the Territory at the hour of opening, was a legal and competent homesteader.

This Department has held in the cases of *Townsite of Kingfisher v. Wood et al.* (11 L. D., 330); *Guthrie townsite v. Paine et al.* (12 L. D., 653); *Blanchard v. White et al.* (13 L. D., 66); *Oklahoma City townsite v. Thornton et al.* (13 L. D., 409); *Winans v. Beidler* (15 L. D., 266); *Hagan v. Severns et al.* (15 L. D., 451); *South Oklahoma v. Couch et al.* (16 L. D., 132), that one who was within the Territory at the hour of noon April 22, 1889, and who took advantage of such presence to secure a homestead, was forever disabled from making a homestead entry within the Territory.

In these cases it was intimated that if no advantage had been taken by those who had thus entered Oklahoma Territory prior to the time set by law, they would not have been disqualified. This question was not presented by the cases then decided, and such intimations were *obiter dicta* and without the force and effect of a decision, but in the case of *Taft v. Chapin* (14 L. D., 593), decided June 3, 1892, Secretary Noble said:

One who was lawfully within the Territory of Oklahoma at the passage of the act of March 2, 1889, and so remains until the lands are opened to settlement and entry, but does not take advantage of his presence as against others to enter upon and occupy land, is not by such presence in said Territory disqualified to enter land therein.

The act says: "Any person who may enter", not "one who wrongfully enters." The words and the act show that the intention of Con-

gress was to prevent any and all persons from making or acquiring any title to the land, who were within the Territory when the hour of opening came. This is the evident interpretation placed upon this legislation by the Supreme Court, for Justice Brewer gives the exception where the strict letter of the law would not apply, making it the same as this Department has held in the cases first cited.

It may be said that if this literal and comprehensive meaning is given to these words, it would follow that any one who, after March 2, and before April 22, should chance to step within the limits of the Territory, would be forever disqualified from taking a homestead therein. Doubtless, he would be within the letter of the statute; but, if at the hour of noon, on April 22, when the legal barrier was, by the President destroyed, he was in fact outside of the limits of the Territory, it may perhaps be said that if within the letter, he was not within the spirit of the law, and, therefore, not disqualified from taking a homestead.

In this case, the contestant was within the Territory at noon, on April 22, 1889, and his presence there is a bar to his ever acquiring title to any lands therein.

It thus follows that the doctrine laid down in *Taft v. Chapin* is contrary to the decision of the supreme court in the case of *Smith v. Townsend*, wherein, in the last clause of his opinion, the learned justice uses the following language:

It is enough now to hold that one who was within the territorial limits at the hour of noon, of April 22, was, within both the letter and the spirit of the statute, disqualified to make a homestead therein.

Therefore the case of *Taft v. Chapin* is hereby overruled.

As Turner was within the Territory of Oklahoma at the hour of noon, April 22, 1889, he clearly comes under the class of those who are forever disqualified from making homestead entry, and acquiring title to land in Oklahoma.

It thus follows that your decision is correct, and the same is hereby affirmed.

The contest of Turner is dismissed, and the entry of Cartwright will be allowed to remain intact.

RAILROAD GRANT—STATE SELECTION.

CAMPBELL *v.* JACKSON.

Lands within the primary limits of a railroad grant, and withdrawn for the purposes thereof, are not subject to selection under the grant made to the new States by section 8, act of September 4, 1841, and no rights are acquired by an application to select, made when the lands are not subject thereto.

Secretary Smith to the Commissioner of the General Land Office, October 17, 1893.

On the 19th of April, 1892, Mary J. Campbell applied at the local land office in San Francisco, California, to make homestead entry for the NE. $\frac{1}{4}$ of Sec. 21, T. 21 S., R. 10 E., M. D. M., alleging residence

and occupation since May 10, 1891, and that she had one hundred and forty acres of the tract under cultivation.

Her application was rejected, for the reason that on the 4th of February, 1890, Henry Jackson, of San Francisco, had applied to locate school land warrant No. 320, issued by the State of California for one hundred and sixty acres of land, upon the tract in question, in part satisfaction of the grant made to said State by section 8 of the act of September 4, 1841, (5 Stat., 453).

Jackson's application was accepted on the 5th of September, 1890, "subject to future examination and adjudication."

From the action of the local officers, Mrs. Campbell appealed to your office. Their decision was affirmed by you on the 6th of September, 1892, and a further appeal brings the case to the Department.

The question in the case is: Were the lands in question subject to selection under the grant to California, as a new State, by the act of September 4, 1841?

That act granted to the several States named therein, and to each *new* State that should thereafter be admitted into the Union, five hundred thousand acres of land, to be selected within their limits respectively, and located "on any public land, except such as is, or may be, reserved from sale by any law of Congress, or proclamation of the President of the United States."

On the 27th of July, 1866 (14 Stat., 292), Congress granted to the Southern Pacific Railroad Company certain lands to aid in the construction of a railroad from the States of Missouri and Arkansas to the Pacific Coast. The land in question was within the primary limits of said grant, and after the withdrawal under such grant, these lands were "reserved from sale by an act of Congress," and were therefore not subject to selection in satisfaction of the grant of 1841, so long, at least, as the railroad grant remained in force.

That grant remained in force until the 29th of September, 1890, when Congress passed "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes." (26 Stat., 496). By that act, the United States resumed the title to

all lands heretofore granted to any State, or to any corporation, to aid in the construction of a railroad opposite to, and coterminus with, the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain.

It is clear, therefore, that from the date of the withdrawal under the grant to the Southern Pacific Railroad, until the passage of the forfeiture act of September 29, 1890, the land in question was "reserved from sale by a law of Congress," and for that reason was not subject to selection under the grant of 1841, to the State of California.

The only application to select the land under that grant, was that of Jackson, presented at the local office on the 4th of February, 1890, and

accepted, "subject to future examination and adjudication," on the 5th of September, of the same year. Both these dates were prior to the passage of the forfeiture act of September 29, 1890.

It is a rule well settled by the Department, that an application to enter land, which is not subject to entry at the time the application is made, confers no rights upon the applicant. This was held in *Goodale v. Olney* (13 L. D., 498), and in *Maggie Laird*, on page 502 of the same volume. In the latter case it was said that an appeal from the rejection of such an application, would not have the effect to cause the application to attach on the cancellation of the previous entry. See, also, *Rumbley v. Causey* (16 L. D., 266).

The same rule would prevail in the case of a selection by a State, and it must be made to appear, that at the time the State applied to select the land, it was subject to such selection. Otherwise, no rights would be secured by the application.

In the case of George B. Shadbolt, and thirty-seven others, *v. St. Paul, Minneapolis and Manitoba Railroad Company* (14 L. D., 613), it was held that no rights were acquired by the presentation of an application to enter lands that are withdrawn for railroad purposes, and that on the subsequent restoration of such land to the public domain, a new application would be necessary to protect the interest of such applicant. In support of this position, the case of *Shire, et al. v. Chicago, St. Paul, Minneapolis and Omaha Railway Company* (10 L. D., 85), was cited, which held that no rights, either legal or equitable, as against a railroad grant, are acquired by settlement upon lands withdrawn by executive order for the benefit of such grant. See, also, *William Ray Durfee* (15 L. D., 91).

The land in question not being subject to selection at the time the application to select was made, it is unnecessary to consider the question as to whether Jackson was, or was not, legally authorized to select land on the part of the State, in satisfaction of the grant of 1841.

The decision appealed from is reversed, and Mrs. Campbell will be allowed to make homestead entry for the land, as of the date of her application, if otherwise qualified.

MEADS *v.* GEIGER.

Motion for review of departmental decision of April 12, 1893, 16 L. D., 366, denied by Secretary Smith, October 17, 1893.

RAILROAD GRANT—RESERVATION—ACT OF MARCH 3, 1887.

UNITED STATES *v.* GRAND RAPIDS AND INDIANA R. R. CO.

The executive order of May 16, 1855, withdrawing certain lands for the purposes of a contemplated Indian reservation was made with due authority, and lands embraced therein at the date of the subsequent grant to this company were excepted therefrom, even though released from such withdrawal prior to the definite location of the road. The case of *United States v. McLaughlin*, 127 U. S., 428, cited and distinguished.

Directions given for a demand under the act of March 3, 1887, for the reconveyance of all lands, situated as those herein, that have been certified on account of this grant.

Secretary Smith to the Commissioner of the General Land Office, October 17, 1893.

I have considered the appeal by the Grand Rapids and Indiana Railroad Company, from your decision of April 14, 1888, holding for cancellation certain selections made by said company during the years 1873 and 1881, for lands in townships 34 and 35 north, range 4 west, Grayling land district, State of Michigan.

These lands are within the primary limits of the grant made by the act of June 3, 1856 (11 Stat., 21), to aid in the construction, among other roads, of that since known as the Grand Rapids and Indiana Railroad.

The 1st section of said act of June 3, 1856 (*supra*), after making the grant of certain described sections, provides:

That any and all lands reserved to the United States by any act of Congress for the purpose of aiding in any object of internal improvement, or in any manner for any purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the route of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the President of the United States.

By order of May 16, 1855, more than a year before the passage of said act, the President of the United States, upon the recommendation of the Commissioner of Indian Affairs, ordered the withdrawal from market of the public lands (*inter alia*), in the townships before mentioned, for Indian purposes, upon the condition that "no peculiar or exclusive claim to any part of the land so withdrawn can be acquired by said Indians, for whose benefit it is understood to be made, until after they shall by future legislation be invested with the legal title."

On July 31, 1855, a treaty was made with the Ottawa and Chippewa Indians of Michigan, by which certain townships were set apart as a permanent reservation.

This treaty was proclaimed by the President on September 10, 1856 (see Revision of Indian Treaties, p. 613), but the withdrawal and reservation mentioned in the treaty did not embrace the townships in question.

Upon the definite location of the Grand Rapids and Indiana Railroad, on December 2, 1857, the limits of the grant were fixed, the lands in question falling within the six miles or primary limits of the grant.

As early as 1874 the question arose as to the rights of the company under its grant within the limits of the reserve of 1855, your office then taking the position that the claimed rights under the grant should be recognized, upon the ground "that the treaty of 1855, proclaimed September 10, 1856, before the right of the road attached, standing in place of and making unnecessary any further legislation, had the effect to release from further reservation the lands not included in its terms, although such lands were not formally restored until 1860."

This Department refused to express any opinion as to the rights of the railroad to lands in range 4, but, on April 25, 1874, a list, submitted on account of the grant in question, was approved.

This is urged as an adjudication recognizing rights in the company to lands similar to those involved, which it is claimed is binding upon this Department, and, consequently, decisive of the question presented by the appeal, for to cancel the selections in question will necessitate the recovery of those heretofore certified.

It is a sufficient answer to this claim to refer to the provisions of the act of March 3, 1887 (24 Stat., 556), providing for the adjustment of all railroad grants not heretofore adjusted, and the recovery of all lands erroneously certified on account of such grants.

In the case of *Bardon v. Northern Pacific Railroad Company* (145 U. S., 535), it is held:

The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws.

In this same case, the court, pages 544 and 545, referring to the case of the *Kansas Pacific Railway Company v. Dunmeyer* (113 U. S., 629), held:

The question, among others, considered was the effect of the abandonment of the homestead claim by Miller upon the ownership of the property. It was contended that although Miller's homestead claim had attached to the land within the meaning of the exception of the grant before the line of definite location was filed, yet, when he abandoned his claim so that it no longer existed, the exception ceased to operate, and the land reverted to the company; and that the grant, by its inherent force, reasserted itself and extended to and covered the land as though it had never been within the exception. But the court rejected this view, stating that it was unable to perceive the force of the proposition, observing: "No attempt has ever been made to include lands reserved to the United States, which reservation afterwards ceased to exist, within the grant, though this road, and others with grants in similar language, have more than once passed through military reservations for forts and other purposes, which have been given up or abandoned as such reservations, and were of great value; nor is it understood that in any case where lands had been otherwise disposed of, their reversion to the government brought them within the grant." Not only does the land once reserved not fall under the grant should the reservation afterwards from any cause be removed, but it does not then become a source of indemnity for deficiencies in the place limits. Such deficiencies

can only be supplied from lands within limits designated by the granting act or other law of Congress. The land covered by the pre-emption entry being thereby excepted from the grant to the Northern Pacific Railroad Company was also thereby excepted from any withdrawals from sale or pre-emption of public lands for its benefit.

It is plain that the previous action of this Department in approving the list referred to on account of this grant, was upon the theory that lands although reserved at the date of the granting act, if subsequently released prior to the definite location of the road, passed to the grant. Admitting that such was the ruling of this Department at the time of the approval referred to, it can not now be followed, in view of the recent decision of the supreme court, above referred to.

It is also urged that the reservation was illegally made, as there was no defined object in view at the time of its creation, no treaty having then been made, but, if legally made, that, under the opinion of the court in the case of *United States v. McLaughlin* (127 U. S., 428), it only served to except from the grant those lands finally determined upon.

In Vol. 1 L. D., page 703, under head of "Reservations," it is stated:

That the power resides in the executive from an early period in the history of the country to make reservations has never been denied either legislatively or judicially, but on the contrary has been recognized. It constitutes in fact a part of the land office law, exists *ex necessitate rei*, as indispensable to the public weal, and in that light, by different laws enacted as herein indicated, has been referred to as an existing undisputed power too well settled to be disputed.

In the present case a treaty was contemplated with the Indians, and the general location had been determined on at the time of the executive order of withdrawal, and without the power to reserve it might have been possible for others to have secured rights in the contemplated territory, which would have embarrassed the government in its future negotiations with the Indians.

I must therefore hold that the order was legally issued, and it but remains to consider the effect of the decision of the court in the case of *United States v. McLaughlin* (*supra*), upon the question under consideration.

I am unable to see wherein the decision in that case can in any wise affect the question under consideration. In that case a Mexican grant fell within the limits of the grant to the Central Pacific Railroad Company, made by the acts of Congress approved in 1862 and 1864.

The Mexican grant was of the second class, or of a certain quantity within a larger tract described by outside boundaries. There had been no reservation made by the United States, but when the territory was acquired from Mexico it was charged with this grant, and by the treaty with Mexico, all private property was to be respected; it but therefore remains to identify the lands granted, and the balance was a part of the public domain subject to disposition by Congress.

As stated by the court:

It may be that the Land Office might properly suspend ordinary operations for the disposal of lands within the territory indicated, and in that sense they might not be considered as public lands; but why should they not be regarded as public lands disposable by Congress itself, care being taken to preserve a sufficient quantity to satisfy the grant.

It was held by the court that, in the case of a floating Mexican grant, the government retained the right of locating the quantity granted in such part of the large tract described as it saw fit; and the government of the United States succeeded to the same right; hence, the government might dispose of any specific tracts within the exterior limits of the grant, leaving a sufficient quantity to satisfy the float.

In the present case, the reserve was made by the United States in contemplation of a treaty, by which certain Indians were to be placed on a permanent reservation. Until the treaty was concluded and proclaimed, it could not be said what amount would be required, or where it might be located. It might have been necessary to retain the entire tract reserved, and even if a part only was found to be necessary, the treaty might have left the location to be selected by the Indians, and not by the government. While in this condition it was clearly segregated from the mass of the public domain, and did not pass under the grant, all lands reserved to the United States for any purpose being, by the terms of the grant, specially excluded therefrom.

The effect of this reservation upon the grants made by the act of June 3, 1856 (*supra*), has before been considered by this Department, in the matter of the grant for the Jackson, Lansing and Saginaw R. R. Company, and was held to have excepted the lands embraced therein from such grant. (5 L. D., 432.) I have gone into the matter thus fully because a decision based on these selections in question will necessitate a demand for the reconveyance of lands similarly situated to those involved, which have heretofore been erroneously certified on account of the grant.

For the reasons herein set forth, I affirm your office decision and direct the cancellation of the selections in question, and also direct that demand be made, under and in accordance with the provisions of the act of March 3, 1887 (*supra*), upon said company, for the reconveyance of all lands similarly situated, which have heretofore been certified on account of this grant.

AGRICULTURAL ENTRY—MINERAL LAND—LOCATION.

ETLING ET AL. *v.* POTTER.

An actual discovery of mineral is a pre-requisite to the location of a mining claim. A certificate of the location of a mining claim can not be accepted as establishing the mineral character of a tract in the absence of other evidence showing an actual discovery of mineral.

The existence of gold in non-paying quantities will not preclude agricultural entry of the land.

Secretary Smith to the Commissioner of the General Land Office, October 17, 1893.

The land involved in this application is the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 26, the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lot 1 of the SW. $\frac{1}{4}$ of Sec. 35, T. 8 N., R. 10 E., M. D. M., Sacramento, California, land district.

The record shows that Frank M. Potter made homestead entry of said tract April 22, 1889, and on February 28, 1890, he gave notice of his intention to make final proof on April 18, following. On the last named date verified affidavits of protest were filed against the allowance of said proof by Theodore Etling, J. J. Leventon, Thomas George, Charles Lemoin and David Bothwell. The protests are accompanied with certified copies of location notices of the following mining claims located by the parties above named, respectively: The Mammoth, located October 12, 1886; the Good Enough, located September, 18, 1888; the Thomas George, located November 5, 1878; the Excelsior, located January 12, 1889; and the Davy Crockett, located January 29, 1889. These protests are presented by the attorney for these protestants, with the request that a hearing be had "to settle the question as to whether the land is mineral or agricultural."

On the day advertised for making final proof, the register and receiver ordered that it might be given, and the testimony taken at some later day.

On October 10, 1891, the local officers rendered disagreeing decisions.

The register reached the following conclusion—

1. That the whole of the lands within the limits of Potter's homestead claim are more valuable for mining than for agricultural purposes, and mineral in character, and should be so declared.

2. That said lands possess no agricultural value.

3. That the said several quartz mining claim locators, on the 22nd day of April, 1889, when respondent filed his said H. A. No. 5450, were entitled to "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," as against the said homestead claim of the said respondent.

4. That the homestead entry No. 5440 of said Frank M. Potter should be canceled

The receiver concluded as follows—

1. That the return of the surveyor general that the SE. $\frac{1}{4}$ of Sec. 26, E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lot 1 of SW. $\frac{1}{4}$ of Sec. 35, T. 8 N., R. 10 E., are agricultural in character, has been successfully rebutted and overthrown in so far as it affects the land embraced in the

Mammoth Quartz mining claim and the Thomas George mining claim, and that the lands embraced in said claims are mineral in character.

2. That said return of the surveyor general as to the agricultural character of the rest and remainder of said described land has not been disturbed by this hearing.

Potter appealed from the decision of the register, and from that of the receiver in so far as it was adverse to him.

An appeal was also taken from the decision of the receiver by those mineral claimants whose locations he held had not been proved to be mineral in character to an extent sufficient to overcome the return of the surveyor general that the land was agricultural.

On June 21, 1892, your office affirmed the decision of the receiver, holding, among other things, that—

The land embraced in contestee's claim having been returned as agricultural in character, and he having filed a homestead application therefor; which is an appropriation of it, the burden of proof in this case rests upon the contestants.

* * * * *

The Good Enough, Excelsior and Davy Crockett lode claims were located prior to the filing of contestee's homestead application. The evidence, however, fails to show that any development work to speak of has been performed on any of them, or that mineral of any stated value has been extracted from any of them. The alleged value of any of the three claims last above mentioned for mining purposes is, in view of the evidence submitted, entirely problematical. It may be true that extensive exploitation of them would disclose great mineral value; but the evidence before me does not show as a present fact that any one of them is a valuable mining claim capable of being profitably worked for its mineral product. It is therefore hereby decided, upon the evidence, that the land embraced in contestee's application in conflict with the Good Enough, Excelsior, and Davy Crockett lode claims is not mineral land.

An appeal has been taken to this Department by said Potter, and by said three mineral claimants.

The testimony is, in my opinion, entirely insufficient to establish the fact that the land is valuable for mining. It is claimed by the witnesses that there is a mineralized belt or zone running through the county in which this land is situated, and, I judge, several miles in width; and in the vicinity of the tract in controversy it is claimed there are a number of mining locations, some of which are paying mines. This mineralized belt is termed, in the testimony, as the "mother lode." So far as any thing in the testimony discloses these locations have been made upon this "mother lode," though the locators have named their claims the Mammoth, etc.

Where there is any testimony offered at all as to these locations, it is like this—

Q. Are you interested in or do you own a claim in this mother lode that you have mined?

A. I do, sir.

Q. What have you called it, if it has any name?

A. The Mammoth Gold Quartz Mining Claim.

In regard to this particular claim, the Mammoth, the owner says he located it in 1886, and that in doing so he complied in all respects with

the regulations and local laws. The certificate of location is identified by the witness, but it is not offered in evidence. On cross-examination he was asked, "How much money in dollars and cents have you realized from your claim, since you located it in Oct., 1886?" A. "Well, I haven't realized any thing out of it as yet, but I expect to."

In regard to the Thomas George claim, he says it is properly located under the rules and regulations of miners, and that he has complied with the law. George says he has made his living out of the gold he has taken out of his claim for several years. But I take it that is from placer mining in the vicinity. It is certain he does not show any vein or lode outside of this so-called "mother lode."

Lemoine says he has a location on the "mother lode" known as the Excelsior; he has never had any of the rock tested, but thinks it will pay.

Bothwell says he has a claim on the "mother lode;" the Davy Crockett. I don't know the value of it, but I have some quartz here that one of my witnesses would testify he saw free gold in;" he has no idea what it would average per ton. There is not a word of testimony offered as to the Good Enough. This is all the testimony there is in the record in regard to location or development of the claims.

It will be seen that there is no competent evidence to show that the claims were even located. When the witness says he has located a mining claim, he is simply stating a legal conclusion. A location must be made on a discovery of mineral. The statute says, "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." (See 2320, R. S. U. S.) The certificates of location are not even offered in evidence. To be sure, they are attached to the protests, and, perhaps if competent testimony had been offered showing a discovery of mineral and compliance with the mining rules, they might have been considered. But a location certificate is but one step, the last one, in the location of a mining claim.

Its objects and functions are peculiar; it differs from ordinary documentary muniments of title in that it is not a title nor proof of title, nor does it constitute, or of itself establish, the possessory right in issue, and to which it relates. It is purely a creature of the statute, and, under evident legislative intent, its purpose and functions are twofold: When duly recorded, it becomes notice to the world of the facts therein set forth, namely, a description of the premises claimed, and by whom and when located, in order to secure the discoverer or claimant against others seeking to locate the same ground; and is thus constructive notice of the claimant's possession. In addition to this purpose which it is to serve it would seem that, by statute, such certificate is made one of the steps requisite to constitute a perfected mining location. (*Stripey et al. v. Stark et al.*, 7 Colo., 614.)

I do not think there is any evidence to show that the land in controversy has any special value for mining purposes. The fact that there may be some small quantities of gold in it not in sufficient quantities to warrant miners to work it, would not prevent the homestead

claimant from taking it as agricultural land. (United States v. Reed, 28 Fed. Rep., 482.)

The judgment is therefore modified; the mining locations will be canceled, and if the final proof of Potter is found to be sufficient, you will permit him to make final entry.

SURVEY—CONTRACT—MAXIMUM RATES.

STATE OF IDAHO.

A contract for survey at maximum rates of lands not specifically designated in the departmental approval of such rates, will not be subsequently approved by the Secretary where it is apparent that compensation in excess of intermediate rates is not authorized by law.

The surveyor-general should give notice of all contemplated public surveys in his district, or those coming under his immediate supervision, and invite bids for the performance of the work.

Secretary Smith to the Commissioner of the General Land Office, October 17, 1893.

I am in receipt of your communication of August 25, 1893, enclosing copies of office letter of date April 8, 1891, and departmental letter of April 11, 1891; diagrams showing the townships proposed to be surveyed under the petitions of settlers; duplicate of contract and bond No. 130, and the accompanying account of cost in detail of the execution of said surveys by the deputy surveyors.

In your letter of August 25, 1893, it is stated that the surveys in question were authorized by your office; that the contract providing for same was formally approved by the Commissioner of the General Land Office, and it is requested that this Department will authorize the payment of maximum rates (\$18, \$15, and \$12) of mileage for surveys as executed in the several townships enumerated in contract No. 130, executed April 29, 1891, and approved May 18, 1891, and also for surveys in township 49 N., R. 3 W.; all of said surveys being in the counties of Latah, Kootenai and Nez Perces, in Idaho.

In letter of April 11, 1891, my predecessor in office, the Hon. John W. Noble, says:

You are hereby authorized to direct the surveyor-general to contract for the survey of the tracts described in the townships named, at rates of mileage not to exceed the minimum rates (\$9, \$7, \$5) for ordinary lands, and not to exceed the maximum rates (\$18, \$15, and \$12), allowed by act of August 30, 1890 (26 Stat., 390), where the lines of survey shall pass over lands that are mountainous, heavily timbered, or covered with dense undergrowth, the liability being chargeable to the apportionment made to Idaho of the appropriation for the survey of the public lands for the current fiscal year.

The rates of compensation for the survey of lands of the class and character of those under consideration, as well as for all public lands

chargeable to the appropriation for the fiscal year ending June 30, 1891, were regulated and established by the act approved August 30, 1890 (26 Stat., 389-390), but it is clear to my mind that said act only authorized the payment of the maximum rates (\$18, \$15, \$12) per linear mile for lines passing over lands heavily timbered, mountainous, or covered with dense undergrowth, only in the States of Oregon and Washington, as will be seen by an examination of the text of the act. Only the intermediate rates (\$13, \$11, and \$7) could be allowed for the survey of that class and character of the public lands outside of the said States of Oregon and Washington. The maximum rates (\$18, \$15, and \$12) per linear mile under the act of August 30, 1890, could be allowed in other States only where the lines of survey extended over lands heavily timbered, mountainous, or covered with dense undergrowth, and, in addition, combining "exceptional difficulties" in the surveys, and where the work can not be contracted for at the intermediate rates.

There is no evidence furnished by the papers submitted to the Secretary in this matter going to show that the surveys under consideration were "exceptionally difficult" of execution.

For the surveyor-general for Idaho, in his report to your office, to state that the lands proposed to be "surveyed in Latah and Kootenai counties were, in fact, identical with the lands in the States of Washington and Oregon," where the maximum rates (\$18, \$15, \$12) per linear mile were authorized by law for the survey of lands that are heavily timbered, mountainous, or covered with dense undergrowth, in the opinion of this Department, clothed my predecessor with no power or authority to prescribe the same (maximum) rates for the survey of lands of a similar class and character in the State of Idaho. If Congress had intended to allow the same rates for survey of lands in Idaho of like class and character with those in Oregon and Washington, it is fair to presume that Idaho would have been included in the proviso favoring said States of Oregon and Washington. Inasmuch as your office was directed and authorized by this Department to award a contract at the rates in question, I do not now propose to disturb the action of my predecessor whereby he directed maximum rates (\$18, \$15, \$12) per linear mile to be paid for the survey of those townships described in your office letter of April 8, 1891, and authorized by departmental letter of April 11, 1891. For the surveys in the townships, however, which were embraced in contract 130, but which were not specifically enumerated in your office letter of April 8, 1891, and approved only so far as designated in departmental letter of date April 11, 1891, the Secretary does not consider that the act of August 30, 1890, authorizes compensation in excess of the intermediate rates. You will therefore allow for the survey of lands in such townships, as also for surveys in T. 49 N., R. 3 W., compensation at rates not to exceed thirteen dollars per linear mile for standard and meander, eleven dollars for township

exterior, and seven dollars for section and connecting lines, where lines of survey pass over lands that are heavily timbered, mountainous, or covered with dense undergrowth; and rates of nine, seven and five dollars per linear mile for standard, meander, township exterior, section and connecting lines, respectively, for ordinary lands.

There is no evidence before the Department that bids were invited in connection with these surveys. Especially in all surveys involving the maximum rates of mileage, your office should direct or require the surveyor-general to give notice of all contemplated public surveys in his district, or those coming under his immediate supervision, and to invite bids for the performance of the work. Such a rule is not only proper, but would undoubtedly work to the benefit of the government, and there is no sufficient reason why it should not be adhered to and enforced.

RAILROAD GRANT—LANDS ERRONEOUSLY CERTIFIED.

UNITED STATES *v.* ST. PAUL AND SIOUX CITY R. R. CO.

Lands within the indemnity limits of a railroad grant cannot be used as a basis for selections under the act of June 22, 1874, and proceedings for the recovery of title should be instituted where selections have been certified on such a basis.

Secretary Smith to the Commissioner of the General Land Office, October 17, 1893.

On November 11, 1892, the St. Paul and Sioux City Railroad Company was notified, by letter of that date, that certain lands therein described had been erroneously certified for the benefit of said company, under the grant made to the then Territory of Minnesota, by the act of March 3, 1857 (11 Stat., 195), and the act of May 12, 1864 (13 Stat., 74), and said company was required to show cause within thirty days why proceedings under the act of March 3, 1887 (24 Stat., 556), should not be instituted to restore the title of said lands to the United States.

February 25, 1893, the railroad company, through its attorney, answered the rule thus laid upon it, by filing a brief relative to said matter.

By letter of May 10, 1893, was transmitted to this Department said letter of November 11, together with the answer of the railroad company thereto, with the opinion of your office, that demand for reconveyance of the lands described should be made upon said railroad company as provided by the act of March 3, 1887, *supra*.

It appears that on September 13, 1875, the St. Paul and Sioux City Railroad Company selected the W. $\frac{1}{2}$ of Sec. 30, T. 105 N., R. 33 W., in lieu of the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of Sec. 25, T. 101 N., R. 45 W., and on October 6, 1875, said company selected the NE. $\frac{1}{4}$ of Sec. 22, T. 104 N., R. 34 W.,

in lieu of the SW. $\frac{1}{4}$ of Sec. 1, T. 102 N., R. 45 W., both of said selections having been made under the act of June 22, 1874 (18 Stat., 194).

The above described lands, in lieu of which said selections and certifications were made, are, as stated by your office, beyond ten and within twenty miles of the line of said railway as definitely located, and, as alleged by said company in its answer, were relinquished by it, under the provisions of said act of June 22, 1874, *supra*.

It appears further that said lands in lieu of which said selections were made, have never been selected by said railroad company in lieu of lands lost in place.

It has been held by this Department, in a number of cases "that lands within the indemnity limits of a railroad grant cannot be used as a basis for selections under the act of June 22, 1874, and proceedings for the recovery of title should be instituted where selections have been certified on such a basis." (15 L. D., 62; 11 L. D., 434; 10 L. D., 50; *Id.*, 609.)

This matter is clearly covered by the decision of this Department, in relation to other lands similarly situated, which were certified to this same company. (See 10 L. D., 50 and 609.)

Under the rule established in those decisions, it is apparent that the certification in the present instant was erroneous, and as under the act of March 3, 1887, it is mandatory upon the Secretary of the Interior to demand a reconveyance of title in such cases, the grant to said company being unadjusted (9 L. D., 649), it is evident that proceedings under the provisions of said act should be instituted to restore the title of said lands to the government.

I therefore direct that demand be made at once on said company for a reconveyance of the tracts in question, and if it fail or refuse to make such reconveyance within ninety days after demand, report of the fact be made to this Department, accompanied by such a record of the case as will enable the Attorney-General to institute proper proceedings, in accordance with the provisions of the act of March 3, 1887.

RAILROAD RIGHT OF WAY—FORFEITURE PROCEEDINGS.

PENSACOLA AND LOUISVILLE R. R. Co.

The lands granted for railroad right of way purposes under the provisions of the act of June 8, 1872, are subject to such reservation, though the road was not built as provided by said act, and can only be relieved therefrom by judicial proceedings or legislative enactment.

Secretary Smith to the Commissioner of the General Land Office, October 17, 1893.

I am in receipt of your office letter of July 26, 1893, whereby you submit for my "consideration and instruction" a question presented to your office "for its decision in an actual case," arising upon the submittal

by several homestead entrymen of proof in support of their claims to certain tracts in Alabama. Your office letter states, that in pursuance of the terms of the act of June 8, 1872, (17 Stat., 340) entitled "An act granting the right of way through the public lands to the Pensacola and Louisville Railroad Company of Alabama," (this company having filed its acceptance of said act and a map of the location of its road), your office letter of July 5, 1873, approved by this Department, directed the district officers at Mobile to "withhold from sale or entry as being reserved for said company" for stations, buildings, and uses thereof, some fourteen forty-acre tracts of land.

Your office states that—

It now appears that the said road was never built as contemplated by the company, or as provided by said act, and that several of the forty acre tracts (notably the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 14, T. 2 N., R. 7 E., and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 2, T. 5 N., R. 8 E.) reserved for station purposes, etc., under said act, have been entered under the homestead law, and the final proofs of the homestead claimants are now pending before this office, awaiting examination for approval for patents in the regular order

Your office further states that—

No forfeiture of the grant has been declared and inasmuch as the same was a present grant, subject to no restrictions, and no penalty appears to have been provided therein against the failure of the company to construct its road, it would seem that the various tracts affected by the reservations for station purposes, etc., as hereinbefore shown, must stand subject to such reservations until a forfeiture of the grant is declared, either by judicial proceedings or legislative enactment, unless, it is submitted, the Department shall find it to be within its jurisdiction to cancel, annul and set aside its approval of such reservations given in the first instance.

The act of 1872, *supra*, so far as material to the present case, reads as follows:

That the right of way through the public lands be, and the same is hereby, granted to the Pensacola and Louisville Railroad Company of Alabama, for the construction of a railroad. And the right is hereby granted to said corporation to take, from the public lands adjacent to the line of said road, material for the construction of said road. Said way is granted to said company to the extent of one hundred feet on each side of said road where it may pass through the public lands; also the necessary lands for stations, buildings, depots, workshops, machine-shops, side-tracks, switches, turn-tables, and water-stations, not to exceed forty acres in any place. The acceptance of the provisions of this act by the said company, and a map of the location of the road, and the lands to be reserved for buildings and uses of said road, shall be filed with the Secretary of the Interior, within one year from the passage of this act; and the road shall be finished within five years from the passage of this act.

The lands in question are thus shown to have been reserved for the benefit of the company by statutory mandate. This being so, such reservation can be revoked only by judicial proceeding or legislative enactment.

If, therefore, the entrymen are allowed to complete their entries prior to such proceedings or enactment, said entries would be, of course, subject to the reservation referred to. In my opinion, relief in the premises can best be obtained through judicial proceedings. Your office

will, therefore, forward to this Department, the record in an actual case to the end that a letter may be prepared requesting the attorney-general, to institute suit to revoke and set aside the reservation made as aforesaid, under the act of June 8, 1872, *supra*.

RAILROAD LANDS—PROCEEDINGS FOR THE VACATION OF PATENT.

THE DALLES MILITARY ROAD CO.

Lands within the overlapping limits of the Northern Pacific Railroad and the Dalles military road, granted to the former company by the act of July 2, 1864, and withdrawn on map of general route for the benefit of said company, are excepted from the subsequent grant to the latter company; and such lands, falling within the terms of the act forfeiting lands opposite the unconstructed portions of the Northern Pacific road, revert to the public domain.

Under the provisions of the act of March 3, 1887, proceedings should be instituted for the recovery of lands excepted as above from the grant to the military road company, but erroneously patented thereto.

The departmental order of May 13, 1893, allowing entries upon the unpatented lands in the same limits as those herein, will remain in force.

Secretary Smith to the Commissioner of the General Land Office, October 17, 1893.

On June 7, 1883, you addressed a letter ("F") to James K. Kelly, president of the Dalles Military Road Company, by which his attention was called to the fact that the grant to his company made by act of February 25, 1867 (14 Stat., 409), overlaps that of the Northern Pacific Company, which was made by the act of July 2, 1864 (13 Stat., 395); that certain of the overlapping lands had been erroneously patented to the wagon road company; that this portion of the Northern Pacific Railroad being unconstructed, the grant therefor was declared forfeited by the act of September 29, 1890 (26 Stat., 496), and the lands appertaining thereto were restored to the public domain; that under the provisions of the act of March 3, 1887 (24 Stat., 556), it is the duty of the Department to recover the title so erroneously transferred, and required him to show cause within thirty days why the requisite steps should not be taken for this purpose.

In response to this demand, Mr. Kelly, as president of the Dalles Military Road Company, and attorney for the Eastern Oregon Land Company, presents at length his objections to suit being ordered for the purpose mentioned. The reasons assigned by him are: First, that the Northern Pacific Company had not the prior right to the overlapping lands, hence the patents to his company were not erroneously issued; second, that the title of his company has been confirmed by the supreme court of the United States in the case of the United States *v.* The Dalles Military Road Company (148 U. S., 31); and third, because the Eastern Oregon Land Company through sundry mesne conveyances

from the Military Road Company, and for a valuable consideration, is the owner of said lands.

It is not necessary to further discuss the first ground of objection. In the case of Oregon and California R. R. Co. (14 L. D., 187), the identical question presented here was considered, and it was decided that—

It is clear, had the Northern Pacific Railroad been constructed through this conflict, its right would have been superior to that of the Oregon and California Railroad Company because any claim the latter company may assert in and to these lands must rest upon the act declaring the forfeiture.

See also Missouri, Kansas and Texas Railroad Company *v.* Kansas Pacific Railway Company (97 U. S., 49); St. Paul and Sioux City Railroad Company *v.* Winona and St. Peter Railroad Company (112 U. S., 720).

The contention that the supreme court has confirmed the title of the Military Road Company to the particular land in dispute in the case of the United States *v.* The Dalles Military Road Company, the Eastern Oregon Land Company, and others, *supra*, is not, in my opinion, tenable. That action was brought by the United States under the act of March 2, 1889 (25 Stat., 850), entitled, "An act providing in certain cases for forfeiture of wagon-road grants in the State of Oregon." By the terms of this act the Attorney General was directed to bring suit to determine whether the road had been constructed in accordance with the terms of the granting acts; the legal effect of the certificates of the governors of Oregon of the completion of said roads; the right of resumption by the United States of the lands granted in aid of said roads, setting aside patents which have issued for any such lands; "saving and preserving the rights of all *bona fide* purchasers of either of said grants or of any portion of said grants for a valuable consideration, if any such there be."

To give a better understanding of the issues in the case instituted in accordance with the act above quoted, it is necessary to read the act of Congress of June 18, 1874 (18 Stat. 80), as follows—

Whereas certain lands have heretofore, by acts of Congress, been granted to the State of Oregon to aid in the construction of certain military wagon-roads in said State, and there exists no law providing for the issuing of formal patents for said lands: Therefore,

Be it enacted, etc., That in all cases when the roads in aid of construction of which said lands were granted are shown by the certificate of the governor of the State of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the State of Oregon as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: *Provided*, That this act shall not be construed to revive any land grant already expired nor to create any new rights of any kind except to provide for issuing patents for lands to which the State is already entitled.

For a full discussion of the pleadings, and issues as finally made, see *United States v. Dalles Military Road Company* (40 Fed. Rep., 114); the same (41 Id., 493); the same (140 U. S., 599); the same (51 Fed. Rep., 629); the final determination of the case being reported in 148 U. S., 31.

In stating the issues presented, Mr. Justice Brewer, speaking for the court, says (pages 37-38, *supra*,)—

The burden of complaint in this case is, that the circuit court erred in restricting the scope of the inquiry. The government sought to introduce testimony to show that the road was never in fact constructed, as required by the act of Congress; and also that the certificates of the governors, made as provided by section 4 of the act of 1864, were obtained by fraud and misrepresentation, as averred in the bill. But all of this testimony was excluded, and the inquiry limited to the single question whether the Land Company was a *bona fide* purchaser.

The first plea of the Land Company recited the fact that three several certificates had been issued by the governors of the State of Oregon, to the effect that the road had been completed as required by the act of Congress, and added, "that each of said several certificates was made honestly and in good faith and without any fraudulent intent or procurement of false representation by any person whomsoever." But upon application to the circuit court this clause in the plea was stricken out, leaving it to contain simply an averment of the certificates of the governors; and as these had been set out at length in the bill, there was no issue of fact presented by this plea. The other plea was that the Land Company was a purchaser in good faith, and to that question, as heretofore stated, the inquiry was restricted.

There was no error in this ruling. The decision of this court, as reported in 140 U. S., 599, was that "the decree of the circuit court, so far as it dismisses the bill, must be reversed and the case be remanded to that court with a direction to allow the plaintiffs to reply to and join issue on the pleas," and the mandate which was sent to the circuit court recited this direction. That decision was the law of this case for the subsequent proceedings in that court. There was no adjudication that the pleas were insufficient in law; on the contrary, the plain implication of the opinion was that they were sufficient, and the question which was remanded to that court for inquiry was as to their truthfulness. There was no adjudication of insufficiency and no rehearing ordered on that question. If the government was not satisfied with the decision, it should have called our attention to it, and have sought a modification or enlargement of the decree. The circuit court properly construed it, and proceeded in obedience thereto to permit the government to join issue on the pleas, and to entertain an inquiry as to their truthfulness, and that was the only matter open for inquiry.

It will thus be seen that the sole questions decided in that case under the issues raised were the legal effect of the certificates of the governors of Oregon, and the rights of the *bona fide* purchasers. It is stated in the opinion of the circuit court of appeals (51 Fed. Rep., on page 633) that the Dalles Military Road Company filed its separate answer to the government's bill, alleging construction of the road in compliance with the act of Congress. No replication, however, was filed to this answer, and the bill was dismissed as to this company. So that it may be said that the government is estopped from again litigating that question as to that portion of the grant to which the right of the transferee of the State of Oregon attached.

But be that as it may, I am unable to see how this judgment can affect these lands which fell within the limits of the grant to the Northern Pacific Railroad, and to which, under departmental rulings (Oregon and California Railroad Company, *supra*,) the rights of the applicants never attached. It is true, the supreme court said, in closing its opinion,—“our conclusion is clear that the title of the purchasers and the land company is beyond challenge.” But it cannot be seriously contended that the court meant to be understood as holding the title of the transferees was “beyond challenge” to any part of the lands which did not pass to the State of Oregon, or its successors, by the terms of the grant. My understanding of the language quoted, and the opinion as an entirety, is that the court simply decided that the transferees were purchasers in good faith of the lands that passed by the grant to the State of Oregon in aid in the construction of this wagon-road.

Much stress is laid by counsel on the act of June 18, 1874, *supra*, and he says, “there can hardly be any doubt that Congress then considered that the Dalles Military Road Company, having a priority of location, had a priority of right to the lands within the conflicting limits between it and the Northern Pacific Company.” This is simply an enabling act passed by Congress to carry into effect the will of the law making power, to issue patents to the land which had theretofore been granted, there being no provision in the granting act authorizing their issuance. It does not confirm the former grant, or enlarge it, but, in the contrary, expressly limits its operation to the original grant. The proviso is— that this shall not be construed to revive any land grant already expired, nor to create any new rights of any kind, except to provide for issuing patents for land to which the State is already entitled.

In commenting upon this act, the supreme court, in *United States v. California Land Company*, *supra*, on page 46, say,—

The original act of 1864 said nothing about patents; it simply granted the lands to the State, and authorized their sale; and only after the arrangement had been made for the purchase of one-half of these lands, and the conveyance made therefor was the act of 1874 passed, providing in terms for patents. The claim of the Road Company was that their title was a perfect legal title, even without a patent; and yet there being a doubt in respect thereto

the doubt was solved by the act of 1874.

By the proceedings at bar it is sought to recover certain lands forfeited to the United States under the act of March 3, 1887 (24 Stat., 556). These lands were originally granted to the Northern Pacific Railroad Company by the act of July 2, 1864, *supra*, and they were reserved, by the statutory withdrawal in map of general route for that company, when patented to the Dalles Military Road Company under its grant of February 25, 1867, *supra*. The issuance of these patents was clearly without authority of law, and proceedings should be initiated to secure their cancellation.

You will therefore make demand on said company, in accordance with the rules, to reconvey to the United States, within ninety days, the lands so erroneously patented; and if default be made in complying with said demand, you will cause to be prepared and forwarded here the record in said case, that the same may be transmitted to the Attorney-General for appropriate action.

By your letter ("F") of July 10, 1893, you transmit an application from Mr. Kelly, in which I am asked to suspend the instructions of May 13, 1893 (16 L. D., 459), relative to allowing entries upon the unpatented lands in the same limits as those above described. This instruction was issued at the request of counsel for "certain settlers" upon said lands, and the question presented was, should settlers thereon be permitted to make entry thereof. It was decided that—

Having determined that the lands are included in the forfeiture declared by the act of September 29, 1890 (*supra*), I am of the opinion that, as declared by the act, they are a part of the public domain, and that no suspension should be ordered to await the result of any action in the courts, contemplated by those aggrieved at my decision in the premises.

I therefore directed "that no order of suspension issue, but that settlers upon such lands be permitted to make entry thereof, as in other cases provided."

The reasons now urged by counsel for a suspension of this order are substantially the same as those offered against the issuance of the demand for reconveyance quoted above.

This *ex parte* application is simply an appeal to the supervisory power of the Secretary of the Interior, as it cannot be classified under any of the rules of practice. I do not think the showing made sufficient to warrant the order asked for. This is purely an administrative question, and it is my opinion that, under the circumstances, in the present instance, it is best not to interfere with the order heretofore issued.

By a subsequent communication from Mr. Kelly, dated September 8, 1893, my attention is directed to the action of my immediate predecessor in suspending the order of February 17, 1892 (Oregon and California Railroad Company, 14 L. D., 187), "looking to the restoration to entry, in accordance with the provisions of the forfeiture act of September 29, 1890, of the unpatented lands within the limits of the grant" to the Oregon and California Railroad Company, "which are also within the limits of the forfeited portion of the main line of the Northern Pacific Railroad grant." It seems that upon the application of said company, your office, by letter of February 27, 1892, addressed to the Secretary of the Interior, recommended that the order issued be suspended until the courts shall determine the issues, giving as a reason therefor that "this office is of the opinion that the public interests, as well as the interests of persons seeking to enter the lands, demand that the restoration thereof to entry be suspended," and on presentation to Mr. Secretary Noble he simply stamped his approval thereon.

It will be presumed, of course, that sufficient reasons were presented to your predecessor and to Mr. Secretary Noble to warrant the action taken, but I do not think the grounds given in the opinion are sufficient in themselves to warrant me in following that order as a precedent in this matter.

RAILROAD GRANT—ADJUSTMENT ACT OF MARCH 3, 1887.

HOULTON *v.* CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RY. CO.

The adjustment act of March 3, 1887, contemplates the final adjustment and formal closing of railroad grants, and the Department will not therefore advise judicial proceedings for the recovery of title to a tract alleged to have been erroneously patented under a grant, where said grant has been finally adjusted and the surplus lands restored to the public domain.

Secretary Smith to the Commissioner of the General Land Office, October 17, 1893.

On April 20, 1893, you transmitted certain papers relative to lots Nos. 6 and 7, of Sec. 29, T. 49 N., R. 14 W., Ashland land district, Wisconsin, and recommended that suit be brought to secure the cancellation of the patent heretofore issued for said lots.

It is stated, your records show that said lots being unoffered land, on August 18, 1854, one Heller Banild filed pre-emption declaratory statement therefor, alleging settlement on June 29th previous, and that said declaratory statement has never been canceled, nor does it appear that said Banild ever did any thing towards complying with the requirements of the pre-emption law, after thus initiating claim to said land thereunder.

By act of Congress of June 3, 1856 (11 Stat., 20), a grant of land was made to the State of Wisconsin to aid in the construction of a railroad therein. The grant was increased by the act of May 5, 1864 (13 Stat., 66), and conferred by the State first upon the La Crosse and Milwaukee Railroad Company, and now belongs to the Chicago, St. Paul, Minneapolis and Omaha Railway Company. The road was built, and has been in operation for many years.

The definite location of the line of road, opposite the lands in question, was made under the first grant on March 2, 1858, when they were found to be within the primary limits thereof. The lots were listed July 12, 1887, by the company as of their granted lands, approved to them as such in list No. 13, and patented December 23, 1890.

On November 8, 1890, one Charles W. Houlton applied to file pre-emption declaratory statement for said tracts. His application was rejected, and on appeal the action of the district officers was, on February 11, 1891, affirmed.

The adjustment of this grant was under consideration by this Department for a number of years, and decisions relating thereto are to be

found in 6 L. D., 195; ib., 209; 9 L. D., 465; ib., 483; 10 L. D., 86; ib., 147; 11 L. D., 607; 12 L. D., 259. Few grants have been more carefully considered, or more completely adjudicated. Under the decisions referred to, after making all proper allowances to the company and deductions from its claims, a surplus of nearly two hundred thousand acres of land remained unappropriated within its indemnity limits.

This surplus land was restored to the public domain, and most, if not all of it, has been entered under the homestead laws.

By the act of March 3, 1887 (24 Stat., 556), the Secretary of the Interior was

directed to immediately adjust, in accordance with the decisions of the supreme court, each of the railroad land grants made by Congress to aid in the construction of railroads, and heretofore unadjusted.

Though the adjustment of this grant was commenced under Mr. Secretary Lamar prior to the passage of the above act, it was proceeded with and completed by Mr. Secretary Noble thereunder.

Counsel for the company having stated in a written communication that all the claims, on the part of the company, through its grants, were under submission to the Department for its action; after a full consideration of the same in the numerous decisions cited, the Department, on February 11, 1890, declared, (10 L. D., 150)—

This will close the adjustment of the grant of the Chicago, St. Paul, Minneapolis and Omaha Company, and there is no longer any reason why the lands withdrawn for indemnity purposes under its grant should remain in reservation.

And later, on December 19, of the same year, the attention of the Commissioner of the General Land Office was called to the fact that he was duly

informed that this action closed the adjustment of the congressional land grants for the benefit of said road, and you were directed to restore to the public domain and throw open to settlement the surplus lands theretofore withdrawn for indemnity purposes, under the grant for said road.

It is thus apparent that this Department considered the grants to this company finally adjusted, and made formal declaration of that fact.

This adjustment was acquiesced in by the company, and unquestionably if it applied to have said adjustment reopened for the purpose of presenting claims for more land, the finality of the departmental action would be a sufficient reason for denying that application. The Department itself promptly acted upon its formal declaration, revoked the indemnity withdrawal which up to that time had reserved the lands within their limits for the exclusive benefit of the grant, and opened the surplus lands to entry under the general land laws.

If, under these circumstances, the company would be debarred from making further claims, unquestionably the government should in good conscience be estopped from opening the adjustment so formally closed.

The adjustment act of March 3, 1887, before cited, evidently contemplates the final adjustment and formal closing of these railroad grants, after which they shall not again be reopened. The first section directs

the adjustment of all grants "heretofore unadjusted," and the second section speaks of the "completion" of the adjustments ordered to be made by the act.

It has been thirty-nine years since Banild filed his declaratory statement that he had settled upon and intended to claim this land under the pre-emption laws; and apart from that statement, there is nothing to show that he ever in fact settled thereon, or made any effort whatever to obtain the same by perfecting the claim which he thus initiated. He is not now claiming the land, and never has been heard of in connection therewith during this long period of thirty-nine years. Nor is any one now claiming the land under him, as privy or assignee, Houlton being merely an applicant to enter the tracts, because, he asserts, they did not rightfully pass to the company under the grant. The land has been claimed by the railroad company, being within its primary limits, since the definite location of its line of road opposite thereto, on March 2, 1858, over thirty-five years ago; and in all probability was long since sold by it, and doubtless has passed through the hands of several purchasers.

In the somewhat similar case of the Hannibal and St. Joseph R. R. (10 L. D., 610), where the question arose as to the propriety of bringing suit to recover title to lands, within the primary limits of that road, covered by unexpired pre-emption filings at the date of the definite location, but which were certified to the railroad company, together with certain other lands, supposed to be within the indemnity limits of said road at the time of certification but subsequently found to be outside thereof, my predecessor Secretary Noble refused to recommend suit, because the grant had been formally declared to be closed and the surplus lands, within the indemnity limits, restored to the public domain. It was also said by him—

Whilst there is no statute of limitations which can be pleaded as a bar to the right of the government to recover lands patented or certified without authority of law, I think this is a case where the repose of so many years should not be disturbed to assert a mere legal title. Besides, it should be remembered that when the United States enters the court as a litigant, they waive exemption from legal proceedings and stand on the same footing as private individuals. If in a court of equity, they must present a case by allegation and proof entitling them to relief. If in the case presented it would be inequitable to grant relief to a private individual, because his equities were stale, relief would be denied to the United States. See *United States v. Flint* (4 Sawyer, 43-48), afterwards affirmed in 98 U. S., 61, as the case of *United States v. Throckmorton*.

I think the ruling in that case should be followed. By so doing, no vested rights would be disturbed, but most probably protected. If, on the contrary, this Department should repudiate its own formal action, and succeed in having the adjustment reopened in the proposed suit, no reason is seen why the court should not, on application of the defendant, reopen and examine the entire adjustment and make a new one to suit its own views. It might well be said by the defendant:

the United States after years of consideration made an adjustment, which they declared to be final and which the company was willing to abide by. That action is now repudiated and declared not to be final. We, the company, have a right to a final accounting and adjustment. If the officers of the government are unable to make adjustment, and it seems they are, the court having jurisdiction over the parties and the subject matter, in the interest of repose and that there may be a final end to litigation, should cause a proper accounting and make a final adjustment between the parties in the matter of this grant, which was made in 1856—thirty-seven years ago. Surely the court could not resist so just and proper an application! Thus all the work, over which the officers of this Department labored so long and so intelligently, would necessarily have to be again gone over, under the supervision of a court of equity.

To my mind, it is much more desirable that there should be finality in the departmental adjustment, than to afford the court the opportunity, by our own action, to reopen, revise, and, perhaps, set aside our work. Under all the circumstances, therefore, I decline to request the institution of suit as recommended, and herewith return the papers in the case.

SWAMP LANDS—ACT OF MARCH 2, 1849.

STATE OF LOUISIANA.

The act of September 28, 1850, removed the restrictions and exceptions in the grant of swamp lands made to the State of Louisiana by the act of March 2, 1849, and vested the title in said State to all the swamp and overflowed lands which remained unsold at the passage of said act of 1850.

A temporary reservation of lands for a special purpose does not defeat the operation of the swamp grant but suspends the execution thereof, and on the removal of such reservation the adjustment of the grant may proceed.

The act of March 2, 1889, providing for the restoration to the public domain and disposition of certain lands in said State, confers a preference right upon settlers on said lands, and to that extent contemplates a diminution of the swamp grant to said State; but as the rights of the State and of the settlers are derived from the same source, priority of grant must determine the priority of right, and as the grant to the State is the first in time it must prevail as against settlement claims under the later act.

Assistant Attorney General Hall to the Secretary of the Interior, October 10, 1893.

On the 16th day of May, 1893, you approved list No. 45 of selections made by the State of Louisiana for swamp and over-flowed lands under the act of September 28, 1850 (9 Stat., 519). After this approval was made by you, the chief of the division of swamp lands of the General Land Office called my attention to what he claimed to be an error that

had been committed by the Land Office and by you in approving these selections. He insisted that the right of the State of Louisiana to select these lands was controlled by the act of March 2, 1849 (9 Stat., 352), and that such right had been denied by the decision of the Secretary of the Interior dated April 11, 1888, and found in 15 Copp's Land Owner, p. 32, and also by the provisions of the "Gay act," act of Congress approved March 2, 1889 (25 Stat., 877). On receiving this information from the swamp land division, I called your attention to the facts and requested that you suspend all action under your approval of the State selections until the matter could be fully investigated, and you accordingly issued an order of suspension.

I.

The act of March 2, 1849, *supra*, granted to the State of Louisiana the whole of the swamp and overflowed lands within her boundaries owned by the United States at that time, except lands fronting on rivers, creeks, bayous, water-courses, etc., and in the second section of said act it is provided that the surveyor-general shall make out lists of the swamp and overflowed lands and certify the same "to the Secretary of the Treasury (who then had charge of this business), who shall approve the same so far as they are not held or claimed by individuals."

The act of September 28, 1850, *supra*, granted to the State of Arkansas the whole of the swamp and overflowed lands made unfit thereby for cultivation, *which remained unsold at the date of the passage of the act*. The last section of this act applies the act to all the States then in existence which had within their boundaries swamp and overflowed lands.

The question as to whether the act of 1850 was applicable to the State of Louisiana was submitted to Attorney-General Garland, who gave an opinion in reply to the question submitted to him, which will be found in 5 L. D., p. 464, in which he said:

This last act (referring to the act of 1850) was substantially a re-enactment of the act of March 2, 1849, so far as Louisiana was concerned, with an extension of the grant in that act so as to include the lands which had been excluded by the exception in the former enactment, as to which it was a new and substantive grant on the 28th of September, 1850.

The act of September 28, 1850, removed all the restrictions and exceptions in the act of 1849, and vested the title in the State of Louisiana to all swamp and overflowed lands *which remained unsold at the passage of said act*.

The chief of the division of swamp lands admits that the lands included in the selections which have been approved by you are of the character designated in the act—that is, they are swamp and overflowed lands, made thereby unfit for cultivation. This being true, the act of 1850 vested the title to these lands in the State of Louisiana,

unless they had been previously sold. The supreme court of the United States, in the case of *Wright v. Roseberry*, 121 U. S., 488, said:

The grant of swamp and overflowed lands to the several States by act of September 28, 1850, is one *in presenti*, passing title to the lands of the character therein described, from its date, and requiring only identification thereof to render such title perfect.

II.

The decision of the Secretary of the Interior (Mr. Vilas) referred to by the chief of the division of swamp lands is based entirely upon the act of 1849. After quoting the second section of the act of 1849, which required the surveyor-general to certify to the Secretary of the Treasury all swamp and overflowed lands so far as they are not claimed or held by individuals, he adds:

The lands in question were not only then claimed, in the ordinary sense of that term, but were held by individuals under as high an evidence of title as any known to our laws.

It will be borne in mind that this limitation in the second section of the act of 1849 upon the right of Louisiana to take swamp and overflowed lands, above quoted, is not to be found in the act of 1850, under which act the adjustment of these lands should be made. The act of 1850 is nowhere referred to in the decision of Mr. Secretary Vilas. Mr. Secretary Vilas held that the lands then in question were not only claimed but that they were held under grants at that time—referring to certain Spanish grants under which these lands had been claimed.

I find that the circuit and supreme courts of the United States had decided, prior to the decision by Mr. Secretary Vilas, that the grants under which persons theretofore claimed these lands were void as to the lands in question, and at the time of the rendition of his decision there were no recognized grants in existence which covered these lands. See *Slidell v. Grandjean, etc.*, 111 U. S., 412, and a full history of the decisions of the circuit court in which other grants than the one then before the court had been declared void.

As has been herein stated, the act of September 28, 1850, grants swamp and overflowed lands to the State of Louisiana as effectually as if the State had been named in the act. This grant was of all the swamp and overflowed lands *remaining unsold at the date of the act*. The courts having decided that titles to the lands in question did not pass under the Spanish grants, it follows that the title to the same was in the United States on the 28th of September, 1850, and that the lands remained unsold at that date. This being true, the title to said land vested in the State of Louisiana at the date of the granting act.

For the foregoing reasons, I must conclude that the decision made by Mr. Secretary Vilas, which was based upon the act of 1849, and which ignored entirely the act of 1850, should not be followed by you.

III.

The lands in question had been reserved from settlement and selection by the State, for the purpose of satisfying such of the Spanish grants, and to such extent, as the claimants thereunder might be found entitled. After the courts decided that these grants did not cover the lands in question, Congress passed an act restoring them to the public domain, known as the "Gay act," March 2, 1889, *supra*.

The reservation of these lands did not affect the grant to the State only so long as the lands were in reservation. In order to defeat the grant to the State under the act of 1850, it must appear that the lands had been sold by the United States prior to the date of said act. The reservation in this case was for a special purpose. See act of March 3, 1811 (2 Stat., 662), and when that purpose was subserved the lands not taken under the Spanish grants were subject to selection by the State. The reservation in this case is the same in this respect as that referred to in 18 Howard, p. 126, in the case of *Ham v. Missouri*, wherein the supreme court decided that a mere reservation from sale is not sufficient to defeat the grant; there must be a sale, or other disposition equally efficient, final and irrevocable.

So, I conclude that because of the fact that these lands had been held in reservation on account of the alleged grants hereinbefore referred to, the right of the State to take these lands was not defeated thereby, but the title in the State to said lands really vested at the date of the granting act. All that was necessary was an identification of the lands which passed under the grant, and when identified, the title became perfect as of the date of the act. 121 U. S., 500. The identification could not be made during the existence of the reservation, but this obstacle to the State's selection did not in any wise impair the grant, and when the reservation was removed the State had the right to make selection of the swamp and overflowed lands within said reservation.

IV.

It is contended by the chief of the swamp land division that the act of March 2, 1889, gives to "settlers" on the lands in question a preference right to make homestead entries, and that the State's selection of lands claimed by settlers should not be approved.

As before stated, this act (known as the "Gay act") was passed after the supreme court had decided that the Spanish grants were void as to all lands covered by them beyond the depth of eighty arpents from the east of the Mississippi River, and the object of the act was to restore to the public domain all of said lands beyond said limits, and which had been held in reservation to satisfy such grants.

The act is as follows:

An act to restore to the public domain and to regulate the sale and disposition of certain lands east of the Mississippi River in the State of Louisiana.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all lands lying in the rear of eighty arpents from and east of the Mississippi River and south of the Bayou Manchac and Amite River, within the limits of townships eight and nine south, of ranges one, two, three or four east, and township ten south of ranges two, three, or four east, in the late southeastern district in the State of Louisiana, which lands have been reserved from sale because claimed to be embraced within certain French or Spanish land grants but which have been, or may hereafter be, decided by the courts of the United States not to be legally embraced within any such land grants claimed to have been granted by the French or Spanish governments within said limits, shall be restored to the public domain and shall be surveyed; and that as soon as said surveys shall have been made, all persons who have in good faith settled upon said lands within the limits of said townships at the time of the passage of this act, and who occupy the same, shall be entitled to enter the same, not exceeding one hundred and sixty acres each, under the provisions of the homestead laws, and shall be admitted to make their proofs and complete their titles in the same manner as if the said reservation, because of said grants claimed, had not been made; and all lands embraced within said townships not covered by actual settlers shall be subject to entry under the provisions of the homestead laws only: *Provided*, That this right of entry shall not extend to any lands within the limits of eighty arpents in depth from the Mississippi River, nor to any confirmed land grants within the limits of said townships; *And provided further*, That all lands disposed of under the provisions of this act shall be subject to all existing servitudes for drainage recognized by the laws of the State of Louisiana: *And provided further*, That neither the claimants under this act as homesteaders nor the State of Louisiana shall be entitled to indemnity from the United States by reason of the passage hereof or of any action under it. That the provisions of this act shall be and are hereby extended to embrace all settlers upon public lands and for the disposition of all public lands embraced in the grant to Daniel Clark as far as decreed invalid by the supreme court of the United States and the unconfirmed Conway claim: *Provided*, That the provisions of this act shall be limited to the lands claimed by actual settlers for purposes of cultivation whose titles are now incomplete, within the limits of the Donaldson and Scott, Daniel Clark, and Conway grants, and that after setting apart to each of said settlers, not to exceed one hundred and sixty acres, the residue of the public lands within said grants shall continue to be, as they are now, a part of the public domain: *And provided further*, That nothing in this act shall preclude the State of Louisiana from enforcing its claim to said residue of public lands under the acts of Congress granting swamp lands to the several States of the Union.

The act clearly and in express terms declares that settlers upon the lands, for the purpose of cultivation, whose titles were incomplete, should have the right to perfect homestead entries thereon.

It is contended by counsel for the State of Louisiana that there is within the territory restored to the public domain, by this act, some land fit for cultivation, in the meaning of the act which granted to the State swamp and overflowed lands, and it was such lands that settlers were permitted to enter, and not such lands as the State has the right to select as swamp and overflowed. While it may be true that some of the land within the territory referred to is of the character stated by counsel, still, I cannot adopt that construction of the act of 1889.

To my mind, it is plain that the act gives to "actual settlers for the purposes of agriculture" the preference right as against the State of Louisiana to enter any lands upon which they may have settled, whether on agricultural lands or on such as the State might select as swamp and overflowed. The third proviso is as follows:

That neither the claimants under this act as homesteaders nor the State of Louisiana shall be entitled to indemnity from the United States by reason of the passage hereof or of any action under it.

This proviso evidently has reference to the claim of Louisiana for swamp and overflowed lands, for, so far as I am advised, there was no other grant to the State of Louisiana of lands within her borders, except the existing servitude for drainage recognized by the laws of the State of Louisiana, which is provided for, as will be seen, in the second section of this act.

It is very strange that Congress would declare that the State of Louisiana should not have indemnity from the United States by reason of the passage of this act, or of any action under it, if it were not the purpose of the act to cut down the grant to the State to the extent of the claim of the actual settlers for purposes of agriculture.

In further support of this construction of the act of Congress, I call attention to two other provisos: The fourth proviso, after stating the character of settlers that shall be protected, and the amount of land that each might enter, declared that—

the residue of the public lands within said grants shall continue to be, as they are now, a part of the public domain.

The fifth proviso is that—

nothing in this act shall preclude the State of Louisiana from enforcing its claim to said residue of public lands under the acts of Congress granting swamp lands to the several States of the Union.

The words "said residue of public lands," in the fifth proviso, clearly refers to that residue of lands which is restored to the public domain by the fourth proviso to the act; that is, the lands not occupied by actual settlers. I am clearly of the opinion that this language will bear no other construction.

It is, therefore, clear to my mind that it was the intention of Congress to give to the settlers a preference right over the State of Louisiana, and, to that extent, to cut off the grant to the State under the act of 1850, *supra*.

The swamp and overflowed lands within the State of Louisiana at the date of the passage of the act of 1889 were not a part of the public domain. These lands had been disposed of by the act of 1850 by a grant to the State of Louisiana. See *Wright v. Roseberry*, 121 U. S., 488; 92 U. S., 733; 103 U. S., 426; 97 U. S., 497; *Lester's Land Laws*, 549 No. 758; *Copp's Land Laws v. 2*, p. 148; 4 L. D., 415; 20 Ark., 100; 24 Ark., 431-444; 29 Ark. 56; 9 Cala., 322 and 554; 27 Cala., 87; 61 Cala., 341; 11 Ia., 450; 53 Mo., 563; 58 Mo., 258; 5 Or., 48; and 78 Ills., 133.

V.

It being true that all of the swamp and overflowed lands within the State of Louisiana at the date of the passage of the act of 1850, which had not then been sold by the United States, passed to the State of Louisiana; and it being true also that the title in the State vested to all that portion of the lands held in reservation on account of the Spanish grants which the courts decided did not pass to the grantees, it follows that the act of 1889 is clearly in conflict with the act of 1850 to the extent that it interferes with the grant to the State of Louisiana. There is no conflict between the act of 1850 and the act of 1889 as to that part of the lands restored to the public domain by the latter act, for the act provides that the State of Louisiana may enforce its claim to "said residue of public lands"—i. e., the lands restored to the public domain by said act. The conflict between the two acts arises out of the provision in the act of 1889 which gives certain rights to settlers, to the extent that the settlers are located on lands that went to the State of Louisiana by the granting act of 1850; to that extent, their claims conflict with the claim of the State. Where there is a conflict between two titles, and either standing alone would be good, it is well settled that the elder must prevail.

The act of 1850 makes an express grant to the State of Louisiana. The act of 1889 does not make a grant to the settlers referred to therein, but it reserves for the use of these settlers a portion of these lands—gives to such settlers certain rights. Where the rights thus given conflict with the right of the State in regard to any portion of said lands, the manifest meaning of the act of Congress is that the settlers shall have the preference.

VI.

This presents a case of conflicting claims derived from the same source, though not technically a case of conflicting grants; but, in my opinion, the rule for determining which is the better of two conflicting grants is applicable to this case.

In 1858 the question was submitted to Attorney-General Black as to the duty of the Secretary of the Interior in reference to two conflicting grants made by Congress, one by the act of Congress of 1850, granting swamp and overflowed lands to the State of Arkansas, and the other by act of Congress of February, 1853, granting lands to the State of Arkansas to aid in the construction of railroads; and under this last-named grant some of the lands previously granted to the State of Arkansas as swamp and overflowed lands were passed to the State for the use of the railroad company. The question presented was, which had the better title under these two grants, the State under the swamp-land grant of 1850, or under the railroad grant of 1853. The Attorney-General gave it as his opinion that the grant of the swamp and over-

flowed lands by the act of 1850 to the State of Arkansas was the prior and better grant. And, in his reply, he said:

Where there is a conflict between two titles derived from the same source, either of which would be good if the other were out of the way, the elder one must always prevail; *prior in tempore, portior est in jure*. This difficulty, therefore, is solved if the mere grant, as you call it, gave the State a right to the land from the day of its date. That it did so there can be no doubt. In an opinion which I sent you on the 7th of June, 1857, concerning one of the same laws now under consideration, I said that a grant by Congress does of itself *proprio vigore* pass to the grantee all the estate which the United States had in the subject matter of the grant, except what is expressly excepted. The act of Congress was of itself a present grant, wanting nothing but a definition of boundaries to make it perfect; and to attain that object, the Secretary of the Interior was directed to make out an accurate list and plat of the lands, and cause a patent to issue therefor. 9 Op. Att'y-Gen.

As to the intention of Congress by the latter act—the act of 1853, to undo what it had done by the act of 1850, the Attorney-General said:

The subsequent grants by Congress to the State for the use of the railroad could not have been intended to take away from the State the rights previously vested in her for other purposes. We are never to impute such intentions to the legislative department when any other construction can be given to the words of a statute. *Ibid*.

As to the act of 1889, I have no doubt that it was the intention of Congress to cut down the grant to the State under the act of 1850, to the extent that might be necessary to protect settlers upon these lands.

Attorney-General Black, in the same opinion, speaking of what would be the duty of the Secretary of the Interior should it be the case that Congress had intended to repeal the former grant, said:

Even if we could suppose that to be the meaning of Congress, it would avail nothing to the latter grantee, since in all cases of conveyance a later grant must yield to an earlier one.

This opinion is cited and approved by the supreme court of the United States in *Wright v. Roseberry*, 121 U. S., 488.

The supreme court of the United States, in *Chandler v. Calumet and Hecla Mining Co.*, 149 U. S., 91, referring to the decision in *Wright v. Roseberry*, stated it was held in that case that evidence was admissible to determine whether certain lands were in fact swamp and overflowed at the date of the swamp land grant, and added: "and that if proved to have been such the rights of subsequent claimants, under other laws, would be subordinate thereto."

This rule for determining the priority and validity of a grant as between conflicting grants, applies as well to intentional as to unintentional conflicts. It goes upon the idea that the grantor, having parted with the title, cannot make a grant to or confer a right upon another which conflicts with the former grant. I am of the opinion that when there is a conflict between the claim of a settler under the act of 1889, and the right of the State under the act of 1850, you should treat the case as one presenting conflicting grants or claims from the same source, and, as the grant to the State is the elder, it should prevail.

I therefore advise that there is no valid reason why the issuing of patent for the selection of lands made by the State of Louisiana as per said list No. 45, approved by you, should be longer suspended, and that the order of suspension be revoked.

Approved,

HOKE SMITH,

Secretary.

RAILROAD GRANT—INDEMNITY SELECTIONS.

NORTHERN PACIFIC R. R. CO.

Lands within the limits of the legislative withdrawal on general route of the Northern Pacific main line (from Wallula to Portland), and also within the indemnity limits of the grant to said company for a branch line (from Portland to Puget Sound), are not subject to selection as indemnity for losses on the branch line while so withdrawn; and the subsequent forfeiture by the act of September 29, 1890, of the lands thus withdrawn precludes the assertion of indemnity-claim thereto on account of said branch line.

Secretary Smith to the Commissioner of the General Land Office, October 17, 1893.

On the 11th of May, 1892, your office rejected indemnity selection list No. 20, made by the Northern Pacific Railroad Company on the 24th of October, 1888, and approved by the local officers at Vancouver land district, Washington, on the 13th of July, 1891.

The land embraced in the list is within the forty-mile limits of the grant of July 2, 1864, to said company (13 Stat., 356), on its line from Wallula down the Columbia River to Portland, Oregon, and were withdrawn August 13, 1870, on filing its map of general route. It is also within the indemnity limits of the part of the company's grant, under the joint resolution of May 31, 1870, from Portland to Puget Sound. (16 Stat., 378).

Your office held that the lands being within the granted limits on general route, under act of July 2, 1864, for that part of the line of road down the Columbia River, could not be selected for indemnity purposes for losses on the part of the line from Portland to Puget Sound.

Your office also held that at the time of the company's application to select, the lands were reserved from selection as indemnity, by reason of being within the granted limits to a railroad company, which lands were forfeited to the United States by the act of September 29, 1890 (26 Stat., 496), and that the sixth section of said act expressly provided that no lands declared forfeited by that act, should inure to the benefit of any state or corporation to which lands may have been granted by Congress.

In the notice of appeal to the Department, it is alleged that your office erred in your rulings, as above stated, and in not holding that the lands were not within the purview of the forfeiture act of September 29, 1890, being opposite a constructed railroad.

That portion of the Northern Pacific Railroad along the Columbia River, to which these lands were granted, has never been constructed, while that portion from Portland to Puget Sound, has been. Had the lands selected been within the granted limits of the last named road, or branch, the claim of the company, that they were opposite a constructed road, and hence not within the purview of the forfeiture act, could be urged with much greater force. Being, however, within the granted limits of a road which was not constructed, they were subject to the act of 1890, which forfeited such lands to the United States.

Granted lands are not subject to indemnity selection, by the company to which they are granted, or by any other company. So long, therefore, as these lands remained within the limits of the unforfeited grant to what was expected to be the main line of the Northern Pacific Railroad, they were not subject to selection as indemnity lands by what was expected to be a branch line of the same road. They remained within that grant until the passage of the forfeiture act of September 29, 1890, and that act expressly provided that no lands forfeited thereby should inure to the benefit of a corporation to which Congress had previously granted lands.

My conclusion is, that on the 24th of October, 1888, the date of the company's selection, the lands being then within the limits of the legislative withdrawal in satisfaction of the grant of 1864, to said road, were not subject to indemnity selection. That such inhibition remained in force until the passage of the forfeiture act of 1890, which expressly provided that no lands declared forfeited to the United States by that act, should, by reason of such forfeiture, inure to the benefit of any State or corporation to which lands had been granted, nor should the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and thereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines had been completed, inure by virtue of the forfeiture thereby declared, to the benefit of the completed line.

It follows, therefore, that the decision appealed from, is correct, and it is hereby affirmed.

APPROXIMATION—PURCHASE UNDER SECTION 3, ACT OF SEPTEMBER 29, 1890.

JAMES R. DANIEL.

Persons qualified to purchase from the United States, under the provisions of section 3, act of September 29, 1890, may take a technical half section, when so platted, even though such half section contains more than three hundred and twenty acres. If the land lies in different sections, or is made up of different quarter sections or lots, the acreage must then approximate, as nearly as may be, the quantity named in the act.

Secretary Smith to the Commissioner of the General Land Office, October 17, 1893.

On the 19th of May, 1891, James R. Daniel purchased, under the provisions of the third section of the act of September 29, 1890, (26 Stat., 496) the N. $\frac{1}{2}$ of Sec. 31, T. 3 N., R. 32 E., La Grande land district, Oregon. He paid the price of one dollar and twenty-five cents per acre for the land, as fixed by said act, and the local officers issued to him a receipt, and final certificate No. 4612.

On June 22, 1892, your office suspended the cash entry of Daniel, "because the tract applied for is in excess of the acreage allowed to be purchased under the provisions of the forfeiture act of September 29, 1890," and directed the local officers to notify the claimant "that he will be required to relinquish one subdivision of his present entry, which will cause the land entered, not to exceed three hundred and twenty acres, and that he will be allowed to elect which portion he will retain."

The case is brought to the Department upon appeal by Daniel, from your decision.

The act of September 29, 1890, was entitled "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes." Among other things provided for in the third section, it was provided that

where persons may have settled said lands with the bona fide intent to secure title thereto, by purchase from the State or corporation, when earned by compliance with the conditions or requirements of the granting acts of Congress, they shall be entitled to purchase the same from the United States, in quantities not exceeding three hundred and twenty acres to any one such person, at the rate of one dollar and twenty-five cents per acre, at any time within two years from the passage of this act.

In transmitting the appeal of Daniel from your office decision, the register concluded his letter by saying:

In this connection will say that this office held that all purchasers under that act were entitled to file upon a technical quarter section of land, and also a technical half section of land. If this is overruled, it will be a great burden to a large number of holders of that class of lands. The reason of this is apparent, if you will take a look at the plats, and note the manner of survey.

In his application to purchase, Daniel showed that he was of the class mentioned in section three of said act, and that he had been in

the actual possession of the land since July, 1878, having established his residence thereon on the 8th of that month, and resided there continuously since. That his improvements thereon were of the value of \$1,500, consisting of a post and wire fence around the entire tract, and a house, blacksmith shop and barn, and that he had all the land plowed, and had raised crops on it for the past ten years.

Ordinarily, a half section of land contains three hundred and twenty acres, and a quarter section, one hundred and sixty. Section 2259, Revised Statutes, which provided for pre-emption filings, after describing the persons who were qualified pre-emptors, said any such person "is authorized to enter with the register of the land office for the district in which such land lies, by legal subdivisions, any number of acres not exceeding one hundred and sixty, or a quarter section of land", etc.

Under this provision of law, the Department has uniformly held that a pre-emptor might make entry of a surveyed quarter section as such, regardless of what may be the actual area thereof. The rule is different, however, where the entry embraces tracts lying in different quarter sections. In such case, the acreage is required to approximate, as nearly as may be, one hundred and sixty acres. This was held in the case of James B. Burns (7 L. D., 20), and several cases are therein cited in support of the rule.

Section 2289, Revised Statutes, provides for homestead entries, and contains language similar to that used in relation to preemptions. Qualified persons are "entitled to enter one quarter section, or a less quantity", etc., not to "exceed in the aggregate, one hundred and sixty acres." The words "one quarter section", and "one hundred and sixty acres", are used interchangeably in all, or nearly all, the laws relating to public lands.

In the case of William C. Elson (6 L. D., 797), which was the case of a homestead entry, and in which the question was very thoroughly considered by Secretary Vilas, it was held that the entry of a surveyed quarter section as such, is authorized by the preemption and homestead laws, and the limit of acreage applied only when entry is made of parts of quarter sections. In that case, the quarter section for which entry was made, embraced 183.70 acres. Your office had required the entryman to relinquish a legal subdivision, "so that the entry would more nearly approximate to one hundred and sixty acres, than it does now." The Department reversed said decision, and directed that patent issue for the quarter section entered.

The case of Elson is cited with approval in the case of Benjamin L. Wilson (10 L. D., 524), although in that case the entry was made up of separate and several lots, instead of a technical quarter section, and the entryman was required to relinquish a legal subdivision, so as to make his entry approximate one hundred and sixty acres.

In the act under consideration, Congress authorized persons to purchase land in quantity equaling a half section. It was not said that

they might purchase a half section, or three hundred and twenty acres, but the number of acres were named. In the case at bar, Daniel is entitled to purchase three hundred and twenty acres of the land settled by him. The technical half section upon which he settled, contains more than three hundred and twenty acres, but if he omits any legal subdivision thereof, the quantity which he is entitled to purchase, will not remain. That the half section settled by him, contains more than three hundred and twenty acres, is no fault of his, and he does not seek to acquire title to the excess, without payment, but has paid the full government price for the whole half section.

Under the circumstances of the case, and in view of the statement of the register, in his letter transmitting the appeal, that to deprive parties who are entitled to purchase under the act, of the privilege of filing upon a technical half section, would cause great hardship to the holders of that class of lands, I am disposed to apply to this case the rule applied by the Department to cases under the homestead and pre-emption laws, in the cases herein cited.

This would lead to holding, that under the act of September 29, 1890, persons qualified to purchase from the United States, under the provisions of the third section of said act, may purchase a technical half section, platted as such, even though such half section contains more than three hundred and twenty acres. When the land sought lies in different sections, or is made up of different quarter sections or lots, the acreage must be required to approximate, as nearly as may be, to the quantity named in the act. The decision appealed from is modified accordingly.

RUMBLEY v. CAUSEY.

On the application of the defendant a rehearing is ordered herein (see 16 L. D., 266) by Secretary Smith, October 17, 1893.

TIMBER CULTURE CONTEST—FAILURE OF SPECIFIC CHARGE.

ALEXANDER v. HAMLIN.

A contestant is required to make a specific charge of default, and prove the default as charged, and, in case of failure so to do, the issue is between the entryman and the government.

The dismissal of a contest, on the failure of the specific charge, does not relieve the entryman from the consequences of his non-compliance with the requirements of the law.

Secretary Smith to the Commissioner of the General Land Office, October 17, 1893.

On the 17th of June, 1885, John D. Hamlin made timber-culture entry for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 12, T. 20 S., R. 21 W., Wa Keeney land district, Kansas.

On the 25th of August, 1890, Margaret T. Alexander filed an affidavit of contest against said entry, in which she alleged that she was well acquainted with the tract of land, and knew its present condition, and that "the said John D. Hamlin has failed to plant or cause to be planted to trees, tree seeds, or cuttings, ten acres of said land from date of entry to present time, and has failed to cultivate said land the last year since date of entry."

The hearing which followed, resulted in a decision by the local officers, on the 26th of November, 1890, in favor of the contestant, which was affirmed by your office on the 7th of March, 1892. A further appeal brings the case to the Department. In the decision of your office, the evidence at the hearing is summarized as follows:

The testimony of all the witnesses in this case show that there are about sixty acres of said tract under a good state of cultivation, but that at the time the hearing was had there were no trees worth speaking of growing on the land. It also appears that the sixty acres have been cultivated to crop each year for several years past. Contestant's witnesses testify in substance that they were acquainted with the land and that, so far as they knew, no trees, tree seeds or cuttings have ever been planted thereon. The defendant and his witnesses, however, testified that ten acres were planted in the spring of 1888, to cuttings or cuttings and tree seeds, which failed to grow, and in the spring of 1889, same number of acres were planted to cuttings and tree seeds, a small proportion of which—from $\frac{1}{2}$ to $\frac{3}{4}$ —made a small growth and then died. In the fall of 1889, all of the ground it seems, was plowed and sown to wheat by a tenant of the defendant who, it is stated was to plant ten acres to trees, or cuttings, which he failed to do, so in the spring of 1890, the defendant caused ten acres to be planted to tree seeds (ash) which was done with a spade, in with the wheat.

I find the foregoing a very fair summary of the evidence in the case, and it will be observed that the allegations of the affidavit of contest are not sustained thereby. Mrs. Alexander alleged that Hamlin had "failed to plant or cause to be planted to trees, tree seeds or cuttings, ten acres of said land from the date of his entry to the time of filing her affidavit." The evidence shows that he planted, or caused to be planted, ten acres of said tract to trees, tree seeds, or cuttings, in the spring of 1888, in the spring of 1889, and in the spring of 1890.

She also alleged that he "failed to cultivate said land the last year since date of entry," while the evidence showed that sixty acres of said tract were under a good state of cultivation and had been cultivated to crop each year for several years.

It is clear, therefore, that the charges laid by Mrs. Alexander, were not established by the evidence at the hearing. Her charges were specific, which was not the case in *Jenks v. Hartwell's Heirs* (13 L. D., 337), wherein it was said: "If the plaintiff had been required to make specific charges of failure, and had failed to establish those charges by his evidence, he would not have been allowed to succeed, although the evidence might have disclosed defaults not specifically charged." In support of that doctrine the case of *Platt v. Vachon* (7 L. D., 408), is cited.

The case last cited not only sustained the rule laid down in the Jenks case, but it was also therein said,—

The contestant having failed to sustain his charges, the question of canceling the entry and forfeiting the entryman's claim, becomes one between him and the government alone, and generally in such cases, where bad faith cannot reasonably be inferred, the entry will be permitted to remain intact.

This rule was followed in the case of *Meyhok v. Ladehoff* (9 L. D., 327). In short, the settled rule of the Department is, that the plaintiff must make specific charges of default, and prove the defaults as charged, and in case of failure to do so, the issue is between the entryman and the government.

In view, therefore, of the charges of the contestant in her affidavit, of the evidence at the hearing, and of the rulings of the Department in the cases cited, I am obliged to dismiss her contest.

This however, does not relieve the entryman and his entry from the consequences of his non-compliance with the requirements of the timber culture law. From an examination of the record in the case, I am thoroughly convinced that no effort, in good faith, was made on his part to secure a growth of timber upon the tract, by compliance with the timber culture law. His efforts seemed to have been directed to growing crops of wheat each year upon the tract, instead of securing a growth of trees. His plantings of tree seeds, and cuttings, were not calculated to result successfully, and exhibited a lack of ordinary diligence.

It was held in the case of *Fierce v. McDougal* (11 L. D., 183), that a timber culture entry must be canceled if the evidence shows that the failure to secure a growth of timber results from a want of ordinary diligence on the part of the entryman. I think the case at bar comes precisely within that rule, and the entry of Hamlin is accordingly hereby canceled.

The decision appealed from is modified as herein indicated.

SETTLEMENT CLAIMS—POSTED NOTICE.

SMITH *v.* JOHNSON ET AL.

Notices defining the extent of a settlement claim posted in conspicuous places thereon, are sufficient to protect such claim as against subsequent settlers; and it is immaterial in such case whether the later settler has actual notice or not, if the posted notices are of such character that they might have been seen by a reasonable exercise of diligence.

First Assistant Secretary Sims to the Commissioner of the General Land Office, October 18, 1893.

On February 23, 1891, Abraham Johnson made homestead entry No. 2169, for the NW. $\frac{1}{4}$ of Sec. 7, T. 48 N., R. 8 W., and on February 24,

1891, Owen R. Tracy made homestead entry No. 2218, for the NE. $\frac{1}{4}$ of the said Sec. 7, T. 48 N., R. 8 W., Ashland land district, Wisconsin.

Subsequently, Henry M. Smith made application to enter the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 7, under the homestead laws, but his claim was rejected because of conflict with the entries of Johnson and Tracy.

Smith thereupon initiated contests against said entries, alleging that he established his bona fide residence on the land applied for by him, on the 2d of June, 1888, and had ever since maintained it thereon.

A trial was had on May 15, 1891, and on May 20, after considering the evidence submitted, the register and receiver found in favor of Johnson and Tracy, and recommended that their said homestead entries be allowed to remain intact.

Appeal was taken by Smith, and on July 30, 1892, your office modified the finding of the register and receiver, directing that so much of Tracy's entry as conflicted with the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ be held for cancellation, and held that although Smith's settlement was made before the land was entered, no improvements were placed by him on any of the land except on the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section, and that in the absence of actual notice to Johnson, Smith acquired no right outside of the technical quarter section upon which his improvements were placed. It appears further that on the trial before the register and receiver Smith, who was a native of Ireland, was allowed to make oral proof of his declaration of intention to become a citizen of the United States, without being required first to lay the necessary predicate for the introduction of secondary evidence, and the question was made before your office on appeal, that inasmuch as it appeared that he failed to file any record evidence showing that he had ever declared his intention to become a citizen of the United States, he is barred from asserting any rights which he may have to the land by reason of his settlement and occupation. In this your office held in substance that the positive statement of Smith under oath, that he declared his intention to become a citizen of this country in May, 1887, having been allowed without objection, and being uncontradicted in the record, must be taken as true, but required him to furnish the best evidence of said declaration of intention within thirty days from the time of rendering said decision.

Smith has appealed to the Department from the judgment of your office, as has also Tracy; the former complaining that error was committed in not allowing him the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ claimed by him in conflict with Johnson's entry and claim, and the latter, because your office holds for cancellation so much of his entry as conflicts with the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$.

The attorneys' briefs in the case raise some questions as to the preponderance of testimony, but it is proved that the land in controversy was a portion of that formerly included within the limits of the grant

to the Wisconsin Central Railroad, but was forfeited by the act of Congress approved September 29, 1890, (26 Stat., 496) and became subject to entry February 23, 1891. The second section of said act provides in substance that all persons who, at the date of the passage of said act, were actual settlers in good faith on any of the lands forfeited, on making due claim on said lands under the homestead law, within six months after the passage of the act, shall be entitled to a preference right to enter the same under the provisions of said act and the homestead law, and shall be regarded as such actual settler from the date of actual settlement or occupation.

It is proven with reasonable certainty that Smith settled upon the land in question June 2, 1888, caused to be erected a house on the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and made other valuable improvements, since which time he has made the same exclusively his home. He also proves that the first year he went there, he put his claim on the quarter post and the eighth post and at the NE. quarter of the section, and on the eighth post, also NW. corner post, and on the door of his cabin. These posted notices each had Smith's name and a description of his claim. They were renewed some time in the winter of 1889 and 1890, and appear to have been there at the time of the entry of the claimants Tracy and Johnson.

After said land became subject to entry, and within the six months allowed by section two of the act hereinbefore referred to, but subsequent to the homestead entries of Johnson and Tracy, in pursuance of his said settlement right he made application to enter the land claimed by him.

The only question to be considered in view of the conclusions of evidence hereinbefore reached, is the extent of Smith's claim by reason of his settlement, improvements and notice.

It is a well established rule of the Department that the notice given by settlement and improvement extends only to the technical quarter section upon which the settlement and improvements are made, or, in other words, to the quarter section as defined by the public surveys. *L. R. Hall* (5 L. D., 141); *Cooper v. Sandford* (11 L. D., 404); *Pooler v. Johnson* (13 L. D., 134); *Shearer v. Rhone* (13 L. D., 480); *Staples v. Richardson* (16 L. D., 248) and *Sweet v. Doyle et al.* (17 L. D., 197). But it has never been held that the notice given by settlement and improvement is the only sufficient notice. On the contrary, it has been repeatedly held that notice given in any competent manner is sufficient. See *L. R. Hall* and *Cooper v. Sandford*, above cited.

In the case of *Sweet v. Doyle* (*supra*) the other cases hereinbefore cited are carefully reviewed, and in that case it was held that

Notices describing the claimed land, posted in conspicuous places on the tract would seem to be quite as effectual in notifying others of the extent of the claim, as improvements placed on the different subdivisions, such as could be placed there during the first period of a settlement claim.

It is true that this delivery is to some extent in the nature of a dictum, it appearing that homestead claimants had actual notice in that case, but I am of the opinion that it is sound law, and that it is immaterial whether claimants had actual notice or not, provided the notice was of such character that it might have been seen by a reasonable exercise of precautionary diligence.

In the case at bar, it is admitted that Smith made his settlement prior to the homestead entries. His improvements were placed on the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 7, but he claimed from the beginning all of the land in controversy, and I am of the opinion that his posting was sufficient notice.

On the question of practice in your office, relative to the filing of certified copy of Smith's declaration of intention to become a citizen of the United States, while it is of questionable propriety, and liable to result in abuses and slipshod practice, to allow the filing of material evidence after the case has gone to judgment, in the case at bar the substantial rights of the parties were not prejudiced thereby.

The judgment of your office, holding that Smith's claim must be rejected as to the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ because made for land in different quarter sections with improvement and settlement all in one quarter, must be reversed as to such ruling, and since he is a prior settler on the land, and that he is now claiming the same land claimed by him from the first, the homestead entries of Johnson and Tracy should be canceled, in so far as they conflict with Smith's claim, and he be allowed to make entry for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section. The judgment appealed from is so modified.

SIoux INDIAN LANDS—ALLOTMENT.

BLACK TOMAHAWK v. WALDRON.

The right to receive an allotment of Sioux Indian land as provided by the act of March 2, 1889, does not extend to the half breeds, or descendants of the mixed bloods, whose claims were recognized in the treaty of 1830, and for whom special provision was made in accordance with said treaty by the act of July 17, 1854. The last proviso to section 8, act of March 2, 1889, does not confer the general right to receive allotments upon half breeds, or mixed bloods, but makes a special provision to cover cases where such mixed bloods may surrender their locations on the islands donated to the adjacent cities.

Assistant Attorney General Hall to the Secretary of the Interior, August 18, 1893.

On November 27, 1891, my predecessor submitted an opinion as to the right of Mrs. Jane E. Waldron to an allotment within the ceded portion of the Great Sioux reservation in Dakota, her right to the same being contested by Black Tomahawk, a full blooded Sioux Indian (13 L. D., 683).

Two questions were formulated by the Commissioner of Indian Affairs, which were referred to this office, by the Secretary of the Interior, for answer.

The first question was, in substance, whether Mrs. Waldron, "a Santee Sioux Indian," receiving annuities and rations at the Cheyenne River agency, in said reservation, was, at the time the act of March 2, 1889 (25 Stat., 888, 889), took effect, and on the evidence furnished, "entitled" to receive such annuities and rations. And, if there was an affirmative finding on this first question, the second question was whether under the law and the evidence she was entitled to the allotment of land claimed by her.

The first question, it will be observed, assumed that Mrs. Waldron is "a Santee Sioux Indian." If this assumption were accepted, it would be immaterial whether she received or is entitled to receive rations at the Cheyenne River agency; and the sole inquiry would be whether "a Santee Sioux Indian" is entitled to an allotment in the ceded portion of the Great Sioux reservation.

If this were the only question in the case, it would be briefly answered by a reference to the second sentence in section seven of the act of 1889, *supra*.

But an examination of the papers then referred showed that the Commissioner had made an unwarranted assumption and thereby unduly restricted the inquiry within very narrow bounds. For the ground on which Black Tomahawk contested the right of Mrs. Waldron to an allotment, was that she was not an Indian, and, as a corollary, not entitled to receive rations and annuities at the agency, nor take an allotment under the law. To the correctness of this contention were addressed all the evidence and arguments in the case.

Therefore, in submitting said opinion, the assumption of the Commissioner was ignored by my predecessor, the real point in the case was discussed, and the contention of Black Tommahawk sustained.

The conclusions reached in that opinion were accepted by Secretary Noble, and the Commissioner of Indian Affairs so informed.

Subsequently the counsel for Mrs. Waldron asked for a rehearing of the matter, that the case might be more fully presented and attention called to the other facts alleged to be pertinent, material and indispensable to a proper disposition of the controversy. In pursuance of this request, the papers in the case were returned to this office, and time and opportunity afforded both parties to submit any evidence or arguments they might deem material to the issues involved. Upon taking charge of this office, finding the matter undisposed of I considered the same, and after a most patient and exhaustive examination of all the questions involved, I have the honor to submit to you my views thereon.

By treaty of April 29, 1868 (15 Stat., 635), what is called the "Great Sioux reservation" located on the upper Missouri, was set apart for the use and occupation of all the Sioux Indians, not otherwise spe-

cially provided for, which exceptions do not enter into the consideration of this case.

It is in regard to rights claimed under the treaty of 1868, *supra*, in connection with the act of Congress approved March 2, 1889 (25 Stat., 888, 889) that the questions arise.

It should be observed that prior to the last date agencies had been established at six different points in the Great Sioux reservation, whereat the United States officers gave to Indians, whom they deemed to be entitled to receive, and had registered, the rations, and paid annuities, provided for by law.

The act of 1889, *supra*, carves out of the Great Sioux reservation six smaller reservations, so that one of said agencies is within each of the latter, setting each one apart for a permanent reservation "for the Indians receiving rations and annuities at the" agency therein, and restores the surplus of the Great Sioux reservation to the public domain.

Section 8 of the act requires the President, when in his opinion it would be for the best interests of the Indians receiving rations on either of said reservations, to cause the same to be subdivided and allotted in severalty to the Indians located thereon, giving to each head of a family three hundred and twenty acres, etc.

Section 13 provides:

That any Indian receiving and entitled to rations and annuities at either of the agencies mentioned in this act at the time the same shall take effect, but residing upon any portion of said Great reservation not included in either of the separate reservations herein established, may, at his option, within one year from the time when this act shall take effect, and within one year after he has been notified of his said right of option in such manner as the Secretary of the Interior shall direct by recording his election with the proper agent at the agency to which he belongs, have the allotment to which he would be otherwise entitled on one of said separate reservations upon the land where such Indians may then reside, such allotment in all respects to conform to the allotments hereinbefore provided.

Section 19 declares:

That all the provisions of the said treaty with the different bands of the Sioux Nation of Indians concluded April twenty-ninth, eighteen hundred and sixty-eight, and the agreement with the same approved February twenty-eighth, eighteen hundred and seventy-seven, not in conflict with the provisions and requirements of this act, are hereby continued in force according to their tenor and limitation, anything in this act to the contrary notwithstanding.

And section 28 provides:

That this act shall take effect only upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in manner and form prescribed by the twelfth article of the treaty between the United States and said Sioux Indians concluded April twenty-ninth, eighteen hundred and sixty-eight, which said acceptance and consent shall be made known by proclamation by the President of the United States upon satisfactory proof presented to him that the same has been obtained in the manner and form required by said twelfth article of said treaty, which proof shall be presented to him within one year from the passage of this act; and upon the failure of such proof and proclamation this act becomes of no effect and null and void.

Article 12 of the treaty of 1868 is as follows:

No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in Article VI. of this treaty.

Upon examination, the President was satisfied that the consent of the Indians, in the manner and form prescribed, was obtained, and duly issued his proclamation to that effect, so that the law is now operative.

The tract of land in controversy, though within the Great reservation, is not within any of the separate reservations, and therefore its disposition is to be controlled more directly by the provisions of section 13 of the act.

It appears that Mrs. Waldron first settled upon the land in question and duly notified the United States agent of her claim thereto, and therefore it must be conceded that as between her and the contestant, Black Tomahawk, she has the better claim, if she is otherwise entitled to an allotment.

It is shown that Mrs. Waldron's great grand mother was a full blooded Sioux Indian, who married Col. Dixon, a white man. Mrs. Waldron's grand mother was therefore a half-breed, and married also a half breed, named Henry Angie; consequently Mrs. Waldron's mother was also a half breed; and she married Arthur Van Meter, a white man; so that Mrs. Waldron, who likewise married a white man, has but one fourth Indian blood in her veins. It is not shown that Dixon and his wife lived with the tribe as Indians, or claimed, or were recognized as having, Indian rights. The same may be said of Angie and his wife, except that Angie and wife, for themselves and children, including Mrs. Waldron, then unmarried, claimed and received Sioux half-breed scrip. And Mrs. Waldron, in her testimony, states that her father supported his family and educated his children off the reservation; that meeting with reverses in 1883 or 1884, they came to the agency and were placed on the roll as entitled to rations, etc., which they have since received.

These are substantially the facts upon which the former opinion was predicated; and they are not materially changed by anything since submitted.

As new and important matter, attention is called, in behalf of Mrs. Waldron, to the report and proceedings of the Sioux commission, which was appointed to visit the Indians and obtain their consent to said act of Congress, as required by section 28 thereof.

In the proceedings of the Commission is found a stenographic report of the conferences held by the Commissioners with the Indians at the different agencies which were visited. Excerpts from the speeches of

the Commissioners and some of the Indians are given, as being authoritative utterances, which it is gravely urged, ought to control the construction of this act of Congress, previously passed and adopted, but which was not to go into operation unless its provisions were accepted by three fourths of the adult male Indians. The correctness of this contention cannot be admitted, for the rule is too well settled to the contrary, by a long line of decisions, to permit of any discussion. Such utterances may have some weight as the opinion of those expressing them, but nothing more.

As to the claim that, because the maternal great grand mother was an Indian, Mrs. Waldron is also an Indian, it is to be observed that under common law rule children follow the condition of the father and not of the mother. Under this rule, without going further back, Mrs. Waldron's father being a full blooded white man, she would be regarded as a white woman. But it is said that the civil law rule relating to slaves prevails among the Indians, and the children follow the condition of the mother. If this be true, for reasons hereafter stated, it is yet very doubtful if Mrs. Waldron's case is made out.

Under the last rule, if it exists, Mrs. Waldron, though of only one fourth Indian, would follow the condition of the mother and also be an Indian like the grand mother and great grand mother, whilst Mrs. Waldron's children, with but one eighth of Indian blood, would in turn follow the condition of their mother, and likewise be Indians, and so on *ad infinitum* to the remotest generations. The proposition seems to carry its own refutation with it.

But in my researches I have not found that such a rule exists to the extent claimed. The counsel for Mrs. Waldron, in seeking to show the existence of the rule, refers to the desire shown on the part of the Indians to care for the half-breeds, mixed bloods, and white men who have married Indian women, and cites quite a number of instances in different treaties with Indian tribes wherein special provision was made for the benefit of the classes spoken of; and to the list given by counsel might be added many more similar instances. From these facts he seems to argue that the rule was general that all such were regarded as entitled to share equally, with the Indians negotiating the treaties, in the benefit thereof.

It seems to me that the facts and citations made by counsel irresistibly lead to the contrary conclusions, and show it was not thought by either party to the treaties that the general provisions thereof, in favor of the Indians of the respective tribes, were applicable to the half-breeds, mixed bloods, or squaw men, as the whites who marry Indian women are called, but that special provisions were necessary to include them.

However this may be among other tribes, there seems to be no reasonable doubt that among the Sioux Indians the half-breeds, mixed bloods, and squaw men are not regarded as Indians and entitled to the bene-

fits of their treaties or allowed a voice in the control or disposition of the tribal property.

By the treaty of July 15, 1830, (7 Stat., 328) with the Sioux, Sac and Fox, and other tribes of Indians, certain land was ceded to the United States for money and other recited considerations. In article 9 it is stated that the Sioux bands in council assembled, having solicited permission to bestow on the half-breeds of their nation a described tract of land as a reservation, the United States agreed to the same, the half-breeds to hold by the same title as other Indians. See also article 10.

Now if the half-breeds were regarded as members of the tribe, Indians in the full meaning of the term as used in the treaty, and comprehended by its provisions, why this solemn action on the part of the other Indians? Why necessary to "solicit" from the United States the permission "to bestow" upon the half-breeds a portion of the land to which as members of the tribe they had an equal right with others? Undoubtedly it seems clear that the half-breeds were not comprehended by the provisions of the treaty, and had to be specially provided for on a special reservation. Or, if this be not true, then it must be held that having been theretofore members of the tribe they were thereafter, with the consent of the United States, to be divorced from their membership, and all rights in common with the other Sioux Indians, to become a special organization and placed on a separate reservation. Either alternative, it seems to me, is fatal to the claim and pretensions of Mrs. Waldron, for, if such be the condition of the half-breeds, *a fortiori* is it the condition of the quarter bloods, who, like Mrs. Waldron, are descended from the half-breeds, whose status and condition were thus established.

That this was the rule which prevailed among the Sioux may be further verified by reference to the stenographic reports of the Sioux Commission heretofore referred to, pp. 93-4. There it will be seen that American Horse, one of the leading Indians, speaking for himself and others, utterly denied the right of the half-breeds, mixed bloods, and squaw men to be recognized and counted as helping to constitute three-fourths of the adult male Indians. In reply, Governor Foster, one of the Commissioners, said:

According to the treaty of 1868, every white man then living with an Indian woman was held to be incorporated into the Indian tribe that participated in the benefits of that treaty. Every squaw man of 1868 has a right to vote here, and without question. There is no question or doubt as to them.

The correctness of this assertion being questioned by American Horse, Governor Foster continued as follows:

You have squaw-men who have come into relation with you by marrying an Indian woman since 1868. They have never been recognized by the agent, I believe, as entitled to the provisions of the treaty of 1868, as squaw-men were before that time. Now, the language of the treaty may possibly, if when construed by our court, include them,—we don't know. Now, we let them sign but we don't count them, so

that if the court in the future should hold that they are entitled to vote here that they can then be counted, and for that reason we take their vote. So far as the half-breeds are concerned, that is to say, every half-breed that has an Indian mother is entitled to all the rights and privileges of an Indian. These rights descend with the mother.

See also to the same effect pp. 173, and 188.

In other places Governor Foster repeated the assertion that the half-breeds, mixed bloods, and squaw-men were included in the treaty of 1868, and those were entitled to a voice in the acceptance of the act of 1869.

On what grounds these assertions are based is not stated by him further than to say that such is his understanding of that treaty. But I have searched its provisions in vain for an expression or implication to justify the assertion. On the contrary, the language used in the treaty negatives any such idea. It is declared that it is made with the chiefs of the different tribes of Sioux Indians; that the reservation is set apart for the absolute and undisturbed occupation "of the Indians herein named," and for such "other friendly tribes or individual Indians" as the Sioux, with consent of the United States, may be willing to admit. And the United States solemnly agrees that no persons except those "designated," and its own officers and employees, shall be permitted to settle or reside on the reservation, &c. See article 2. Article 6 provides that any individual "belonging to said tribes of Indians or legally incorporated with them," may have a tract set apart for farming, etc. This plainly means any individual Indian belonging to the Sioux tribes, with which the treaty is made, or "other friendly tribes, or individual Indians" admitted to the reservation in accordance with the provisions of article 2.

And thus, throughout the whole of the treaty, its provisions are made specifically applicable to Indians, and Indians only, not the slightest reference being made, directly or indirectly, by expression, suggestion, innuendo, or implication to half-breeds, mixed bloods, squaw-men, or any others than Indians.

Finding in the treaty no basis for this assertion, nor elsewhere any facts to sustain it, I am forced to the conclusion that it was made under a misapprehension, and therefore is not entitled to the weight it would otherwise have because of its distinguished author.

As a sequel to what has been shown in relation to the establishing of a special reservation for the half breeds of the Sioux Indians by the treaty of July 15, 1830, Congress, by act approved July 17, 1854 (10 Stat., 304) authorized the purchase of that reservation from the half-breeds and mixed bloods, and the issue to them in payment thereof of what is well known in this Department as "Sioux half-breed scrip." In accordance with said act the purchase was made and the scrip issued as directed.

Now, it is to be remembered in this connection that Mrs. Waldron claims an equal right with other Indians to an allotment in the Great

Sioux reservation through her half-breed mother, Mrs. Van Meter, who was Mary Angie before her marriage. Counsel calls the claim "the mother right," and says it is well recognized among Indian tribes.

That Mrs. Waldron's mother and grandmother did not claim to be, and were not regarded as, Sioux Indians, entitled to participate in the tribal rights and share in its property, is abundantly shown by the fact that as half-breeds they claimed the benefit of article 9 of the treaty of July 15, 1830, *infra*, setting apart the separate reservation for the half-breeds, and under the act of July 17, 1854, received Sioux half-breed scrip in payment for their interest in said reservation, an interest separate and apart from any possessed by the Sioux Indians proper, who were not recognized as having any right or interest in that reservation, and received no part of the scrip authorized to be issued in payment therefor. The records of the Indian Office show that Mrs. Waldron's mother and grandmother received each scrip for four hundred and eighty acres, their allotted proportion of the land within said reservation, the scrip issued to the Angie family aggregating 3,840 acres.

It seems to me that Mrs. Waldron's claim to an allotment in the Great Sioux reservation might here be dismissed without further discussion, for, after these half-breeds thus had a large and valuable portion of the tribal property bestowed upon them, which, when divided, gave to each half-breed and each descendant of the mixed blood four hundred and eighty acres of land to sell, and which they did sell, it is hard to believe that it is the intention of the government to force the Sioux Indians to again divide their inheritance with them or that it is the wish of the Indians to share equally with these remote descendants of ancestors, who themselves were not permitted to share equally with the tribe, because not of the full blood.

This reservation given to the half-breeds of the Sioux tribe may be likened to an advancement as known to our law. And certainly Mrs. Waldron, claiming through her "mother right," as her counsel calls it, should be compelled to place in hotchpotch what that mother right received by way of advancement before claiming further interest in the tribal property.

In behalf of Mrs. Waldron's claim attention is called to the following certification by the Sioux Commissioners found on p. 308 of their report:

We certify that the signature or mark of each Indian to the above was, together with his seal, affixed thereto; that each and every Indian who signed the same is, to the best information attainable, and to the belief of the Commission, of the age set opposite to his name; that they are of a class mentioned in the act of March 2, 1889 and the treaty of April 29, 1868, as entitled to sign; and that they signed the same freely and voluntarily with fair and full understanding of its purport, operation, and effect.

Also to the following sentence in the message of the President transmitting said report to Congress:

It appears from the report of the Commission that the consent of more than three-fourths of the adult Indians to the terms of the act last named was secured, as

required by section 12 of the treaty of 1868, and upon a careful examination of the papers submitted I find such to be the fact, and that such consent is properly evidenced by the signatures of more than three-fourths of such Indians.

And in connection therewith reference is made to exhibit "A" p. 35 of the report, which states that the total number of adult males at the different agencies entitled to vote on the acceptance of the act of 1889 is 5,678; and the number of those who signed an acceptance of the act of Congress is 4,463, or two hundred and six more than the three-fourths required by the act of Congress. It is said, however, that of those who signed four hundred and nineteen were mixed bloods and white men, and among the latter were C. W. Waldron, the husband of the claimant here, also her father and brothers.

In view of these matters, it is urged that under a proper construction of the law the parties signing the agreement must either be held to be Indians, or the integrity of the agreement itself must be challenged.

I am not much impressed by the force of this argument, for if it be considered that Waldron signed the agreement and is an Indian, then it would be Waldron, the Indian, who, as the head of the family, would be entitled to an allotment of three hundred and twenty acres, and not his wife, who, under the act of Congress, would not be entitled to any allotment whatever.

I have not gone over the signatures to the agreement to verify the foregoing statement as to the number of full bloods, mixed bloods and whites who signed the same. The President was made, by the act of Congress, a special tribunal to ascertain and proclaim whether assent was given to the act by "at least three fourths of the adult male Indians" occupying and interested in the Great Reservation; and he states that upon a careful examination he finds "such to be the fact," and he has accordingly so proclaimed it. His action in the premises is conclusive on this Department, and the integrity of the agreement cannot be challenged here in this respect.

An examination, however, of the list of those who signed at the Cheyenne River Agency discloses the names of three Van Metres, p. 288-9, possibly brothers of Mrs. Waldron, and the name of C. W. Waldron, her husband, p. 291, but the name of her father, Arthur Van Metre, is not found. None of said parties are put down Indians with Indian names; two of the Van Metres are put down as belonging to the Two Kettle Band; the other Van Metre and Waldron being described as white men.

When we recall what Governor Foster said, in reply to the objection of American Horse, "we let them sign, but we don't count them," we see how utterly unimportant is the fact that these whites and mixed bloods were allowed to sign the agreement.

It is further urged in behalf of Mrs. Waldron that the fact of "receiving" rations and annuities at the Cheyenne River agency at the time that the act of 1889 became effective conclusively establishes her right

to an allotment thereunder, and section 4 of said act is quoted as authority for the position.

That section merely defines the boundaries of the reservation set apart "for the Indians receiving rations" at the Cheyenne River agency, and does not speak of the allotments. But section 8 does, and uses substantially the same language. It authorizes the President, whenever, in his opinion, "the Indians receiving rations" on any of said reservations are sufficiently advanced in civilization, etc., to cause allotments in severalty to be made "to the Indians located" on the particular reservation. But as Mrs. Waldron is not "located" upon the Cheyenne River Reservation, nor seeking an allotment of any lands within the limits thereof, section 8 is not more applicable in her case than section 4.

As said before, her application comes directly under the provisions of section 13 of the act herein quoted. She does not seek an allotment inside of the diminished reservation, but claims land outside thereof, within the Great Reservation, and on which she appears to have been residing February 10, 1890, when the President's proclamation was issued, and the act of Congress became effective (26 Stat., 1554).

Whilst only the words "receiving rations" etc., are used in section 8, when we come to section 13, it provides that allotments are to be made to those "receiving and entitled to rations," etc. It is contended that the language of the last section is meant to apply to two classes: those who are actually "receiving" rations, etc., and those who, though not receiving, are "entitled to" rations; and that Mrs. Waldron being of the first class, it is not intended that an inquiry shall be made as to whether she is "entitled" to rations or not.

I cannot bring myself to take this view of the law. To adopt it would be to ignore the great purpose of the act, which is to promote the civilization of the Indians, who held the possessory title to the original reservation, by dividing the same among them in severalty to the extent authorized. This end could not be promoted by giving allotments to parties, interlopers, or intruders, who may have succeeded in imposing upon the United States agent so as to be placed upon the rolls and actually "receiving" rations, though not "entitled" to them. And I may add that I do not think the word "entitled" adds any strength to, or injects any new or different condition in this section from that found in section 4 and 8. I cannot bring myself to believe that it was the intention of Congress that rations should be given to parties not entitled; or that if such parties were illegally "receiving" rations, that fact should cut off all inquiry, and the beneficiary of this one wrong should be further rewarded by allotting to him land to which he is otherwise not entitled, either in law or good conscience. I think when Congress spoke of parties receiving rations, it meant those who were rightfully receiving them, not those who were obtaining them wrongfully. Therefore, I say that the meaning of the statute would be as clear without

the word "entitled" as with it, and that it gives to it no force or meaning which it does not have without it.

This view makes all the provisions of the statute, in relation to the rations, annuities and allotments thereunder read harmoniously together; whilst the other would establish incongruities and work an injustice which it is not for a moment to be believed that Congress contemplated.

It is further urged that the eighth or last proviso of section 8 of the act of 1889 expressly recognizes the right of mixed blood Indians to have an allotment as here claimed by Mrs. Waldron.

The portion of that section referred to first donates by name certain islands in the Missouri and Niobrara Rivers, and part of the Sioux Reservations, to the adjacent cities, and then provides—"That if any full or mixed blood Indian of the Sioux Nation" shall have located upon either of the islands prior to the passage of the act, his improvements shall be appraised, and upon payment therefor the Indian shall remove from the island, "and shall be entitled to select instead of such location his allotment according to the provisions of this act" upon any unoccupied lands which were within the original reservation.

I do not understand the language of this proviso as having the effect claimed for it. As I read it, Congress, for satisfactory reasons, desired to give the mixed bloods, if any, who lived upon and had improved these islands, the privilege of taking allotments elsewhere in lieu of the lands occupied by them. I do not perceive that there is anything in this special legislation inconsistent with the views heretofore expressed by me. On the contrary, if any deduction is to be made therefrom, it would seem proper thus to hold that, Congress cognizant of the fact that mixed bloods were not entitled to allotments under the general provisions of the act, when it was intended that those living on the island should exercise such a right, was very careful to accord it to them expressly and in terms not to be mistaken. Its action in this instance clearly recognizes the distinction between the two classes, and in unmistakable terms includes both. The reference to this proviso seems to make plainer the conclusion that mixed bloods are not accorded the right of allotment under the other provisions of the law.

After a careful consideration of all matters presented, old and new, and a patient study of the whole case, I find additional reasons for the correctness of the views heretofore submitted in the case. I therefore advise you that in my opinion Mrs. Waldron is not entitled to the allotment claimed by her.

Approved,

HOKE SMITH,

Secretary.

NORMAN L. CROCKETT.

Motion for review of departmental decision of March 30, 1893, 16 L. D., 335, denied by Secretary Smith, October 23, 1893.

TIMBER LAND ENTRY—SPECULATIVE ENTRY.

UNITED STATES *v.* BAILEY ET AL.

The issuance of a final certificate on a purchase of timber land under the act of June 3, 1878, does not deprive the Department of jurisdiction to inquire into the character of such entry; and a purchaser of the lands so entered, prior to the issuance of patent, takes the lands subject to the final action of the Department.

Timber land entries made for a speculative purpose, and through a collusive arrangement by which the entrymen are induced to make said entries with a view to selling the lands embraced therein to the other party to such arrangement, are in violation of the statute and must be canceled.

The case of *United States v. Budd*, 144 U. S., 154, cited and distinguished.

Secretary Smith to the Commissioner of the General Land Office, October 19, 1893.

By departmental letter of January 31, 1891, your office was directed to transmit to this Department the papers in the matters of the timber land entries of Henry McBride and others made at the land office at Seattle, Washington, in which your office rendered a decision on January 20, 1891, allowing said entries to remain of record. The reason for this action is found in the following quotations from said departmental letter, viz:

Among the questions passed upon in said decision, as I understand, was that as to the character of the land covered by the several entries, namely whether they were lands properly subject to entry under the timber land act of June 3, 1878. Inasmuch as this question has recently been before the Department, and as entries made under the law above mentioned and involving the same question are now pending, and it being apparent that the entries acted upon by your said office decision of the 20th instant, cover a large area of land, and involve interests important to the government, I deem it advisable to direct that you forward the record in the several cases adjudicated by said decision for my personal examination and consideration.

The papers were duly transmitted in accordance with said directions and have been carefully examined and the questions presented have been considered.

The entries and lands involved are as follows:

Henry McBride No. 7363, July 6, 1883, lots 2 and 3, and SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 1, T. 36 N. R. 3 E., land transferred to J. Theodore Lohr, July 23, 1883, and on the same day by him to Stephen S. Bailey.

William Gilmore No. 7104, May 4, 1883, lot 4 and S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and NW. $\frac{1}{4}$, SW. $\frac{1}{4}$, Sec. 1, T. 36 N., R. 3 E., land transferred to Bailey, April 30, 1883.

Edwin L. Chalcroft No. 6939, March 12, 1883, SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 1, T. 36 N., R. 3 E., land transferred to Bailey March 13, 1883.

Henry H. Stanley No. 6975, March 27, 1883, E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 2, T. 36 N., R. 3 E., land transferred to Gilmore April 30, 1883, and by him to Bailey on the same day.

Edward Crome, No. 6938, March 12, 1883, S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 12, T. 36 N., R. 3 E., land transferred to Bailey March 14, 1883.

Henry Brandon No. 6936 March 12, 1883, N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 12, T. 36 N., R. 3 E., land transferred to Bailey March 14, 1883.

Winfield S. Wilson No. 7500, August 13, 1883, SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and lots 1, 2 and 3, Sec. 35, T. 37 N., R. 3 E., land transferred to Bailey August 15, 1883.

Wayne W. Holcomb No. 7071, April 26, 1883, NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 12, T. 26 N., R. 3 E., land transferred to Bailey April 26, 1883.

Henry C. Hackley No. 7081, April 30, 1883, SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 12, and NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 13, T. 36 N., R. 3 E., land transferred to Bailey April 30, 1883.

John E. Brandon No. 6937 March 12, 1883, E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 12, and NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 13, T. 36 N., R. 3 E., land transferred to Bailey March 14, 1883.

William L. Rogers No. 6999 March 31, 1883, lots 2 and 3, and E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 7, T. 36 N., R. 4 E., land transferred to Gilmore April 18, 1883, and by him to Bailey April 30, 1883.

John L. Leslie No. 7424, July 19, 1883, NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, W. $\frac{1}{2}$ NE. $\frac{1}{4}$ and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 18, T. 36 N., R. 4 E., land transferred to Bailey July 21, 1883.

It also appears that Bailey transferred all of the lands embraced by said entry to Russell A. Alger and Ravaud K. Hawley, the present claimants, by warranty deed, dated December 29, 1887, for the price of \$12 per acre, \$5 in cash and balance to be paid when Bailey should furnish a patent from the United States.

In July, 1888, special agent Carson of your office made a report in regard to each of said entries, recommending that each of them be held for cancellation because made in the interest of third parties, and because the land was agricultural in character and not subject to entry under the act of June 3, 1878 (20 Stat., 89). You thereupon held the entries for cancellation allowing the parties sixty days within which to apply for a hearing. The transferees of said entryman appeared at the local office within the time specified and entered a motion to dismiss all proceedings against said entries, upon the ground that your office had no jurisdiction over an entry after the issuance of a final receipt, and at the same time filed an application for a hearing, expressly reserving all rights under the motion to dismiss. Said motion was denied and a hearing was directed and had before the local officers beginning August 27, and continuing until November 30, 1889; all said cases being by stipulation consolidated and tried and considered as one case. In addition to the question of fraud in making these entries, and that as to the character of the land, the transferees asserted again that there was no jurisdiction to investigate or authority to cancel an entry after issuance of final certificate, and further that they were entitled to protection as innocent purchasers. The register in quite a long opinion decided against the defendants on those two points, against the gov-

ernment on the question of fraud in making said entries, and that part of the land was agricultural, specifying the tracts, and part of the character prescribed by the act of June 3, 1878. The receiver held that the transferees were entitled to protection as *bona fide* purchasers and that the entries should be passed to patent. You decided adversely to the defendants on the question of jurisdiction, did not specifically pass upon their claim for protection as innocent purchasers, held adversely to the government as to the question of fraud and as to the character of the land.

That this Department had jurisdiction over these entries until the issuance of patent is a proposition so frequently asserted in the decisions that it is unnecessary to discuss it at this time. The following cases may be referred to as embodying the views of this Department on that question. *Smith v. Custer et al.*, (8 L. D., 269); *Travelers' Insurance Company* (9 L. D., 316); *United States v. Montgomery* (11 L. D., 484); *United States v. Miller* (14 L. D., 617).

The contention that transferees of this class of entries are entitled to protection as innocent purchasers has been strenuously asserted in other cases and recently considered by this Department. It was then concluded that such transferees occupied the same position and are to be treated the same as transferees of lands covered by entries under the pre-emption law, the cases of *Smith v. Custer et al.*, *supra* and *Travelers' Insurance Company supra*, being cited to show the rulings of the Department upon that class of cases. *U. S. v. Allard et al.* (14 L. D., 392); *U. S. v. Miller, supra*.

The testimony of six witnesses, as to the character of the land, was introduced on the part of the government. They testified that the lands covered by said entries, if cleared would be fit for cultivation; and would produce valuable crops by the ordinary methods of farming in the State of Washington. They place the value of the lands generally at from \$400 to \$500 per acre, when cleared, and they base their judgment as to such value upon their conclusions that said lands will produce crops worth about \$50 per acre each year, after paying expenses of cultivation. They concede that there is a considerable amount of timber on most of the land, and that the lands would not be worth anything for agricultural purposes until cleared of the natural growth of timber on it.

The transferees introduced eleven witnesses whose testimony tended to show that said lands, with the exception of the entry of Rogers, are covered with valuable timber; some of them testified that the lands, if cleared, would not be fit for cultivation; that it would cost from \$200 to \$500 per acre to clear the land, and that the land is chiefly valuable for its timber.

Taking all of the evidence in the case together, as to the character of the lands in question, it may be true that the greater part of them might very properly be held to be subject to entry under the timber

and stone act of June 3, 1878 (20 Stat., 89); yet, it is entirely reasonable to conclude that land which will produce agricultural crops of the value of \$50 net per acre each year, could not in the very nature of things be chiefly valuable for the timber standing upon it in its natural state.

In view of the conclusion I reach upon the whole case, I deem it unnecessary to pass upon the character of the land in controversy at this time, but prefer to remit this question entirely to the future when it may or may not arise.

The paramount and controlling question in the case, applicable alike to all of these entries, is: Were they made in good faith for the benefit of the respective entrymen, or were they fraudulently made for, and in the interest of, another or others? The fraud charged in connection with these entries is that they were made at the instance and for the benefit of Stephen S. Bailey and J. Theodore Lohr, to whom the lands were sold and conveyed, one tract before, and the other soon after the entries were made.

The government offered no testimony-in-chief to support the allegations that said entries were made in the interest of said transferees, other than what might reasonably be inferred from the records, showing dates of said entries and transfers thereof.

These entries were all transferred to said Stephen S. Bailey. On December 29, 1887, Bailey sold and conveyed by warranty deed all of the land embraced in said entries to Russell A. Alger and Ravard K. Hawley, the present claimants, for the price of \$12 per acre; \$5 in cash, and the balance to be paid when a patent should issue. There is no charge, nor is there any testimony affecting the transaction between Bailey and Alger and Hawley.

The first witness for the transferees, J. Theodore Lohr, testified, on cross-examination, that prior to coming to Washington in 1882, he had been employed in "locating people on government lands, and buying and selling timber lands and farming lands;" that he had dealt more in timber than agricultural land, and usually received \$50 for each claim located; that he had located between fifty and sixty persons in Washington Territory since he went into said business (Ev. p. 808); that the Henry McBride, Chalcraft, Henry E. Brandon, Crone, Holcomb and Hackley claims were located by him; that he gave Gilmore description of his claim; also the Leslie claim (Ev. 809); that he did not give description of the Rogers claim, but thinks he gave descriptions of the Stanley and Wilson claims. Lohr also testified that in the winter of 1882 and spring and summer of 1883, his headquarters were in Seattle, and that the first part of the time he boarded at the New England Hotel, of which said Bailey was proprietor; that he located said parties in 1882, and at the time some of the locations were made was personally acquainted with said Bailey; that his acquaintance with Mr. Bailey was "after most of these entries were located;" "that he knew Bailey

on January 1, 1883; and located McBride some time in 1883, but does not remember what part of the year;" that he first knew McBride in 1882 at Laconner; that he was known as a land locator, and gave McBride description, and was afterwards requested by him to show him over the claim some time in the summer of 1883; that he told McBride he would charge him \$50 or \$100 for locating his entry; that he located McBride in one day; that after coming back from examining the claim witness bought said claim, but does not remember when the entryman made his final proof; that he does not remember being in Olympia on or about June 22, 1883, and does not know who paid the money for the McBride entry; that witness frequently went to the land office, and parties sent their money by him to pay for their claims after having made final proof, but does not remember taking any money for the McBride entry (Record p. 814). Lohr also swears that the money to pay for the McBride entry was not given to him by S. S. Bailey (Record p. 815); that when he got the duplicate receipt for parties, he turned them over to them; that he had no understanding with McBride in the month of June, 1883, relative to the purchase of his entry, other than what he had with all parties whom he located; that he agreed to buy any claim located by him after the entryman had obtained title, if he wanted to sell, and would pay more than any one else (Record p. 1816); that he could do this because it would save an examination of the claim, and he agreed usually to give \$50 more than any one else would give, which promise was given "as an inducement for the parties to take my (his) word and knowledge as being good as to the quality and quantity of timber" (Record 817); that nothing was said about paying the expenses of locating and examining the land or the land office fees outside of the purchase price; that the agreement with McBride for his claim was made on July 23, 1883, and not before (Record p. 821); that he sold the McBride claim to S. S. Bailey in the fall or summer of 1883. Lohr further swears that he had an agreement with said Bailey in the spring of 1883 to the effect that he would invest in lands where witness thought there was a good bargain; that Bailey would furnish the money to buy the land, provided he, Lohr, would attend to the buying and selling, and the profits growing out of the sale should be shared between them (Record p. 824); that said agreement was verbal only, and Mr. Bailey carried out his part thereof; that witness did not locate these entries in pursuance of this agreement; that he does not remember ever having loaned any of these entrymen any money; but it is probable that he did; that he remembers having made an affidavit in June, 1888, before Special Agent Carson, relative to said entries, but can not say just what it contained (Record p. 826); that when he carried money to entrymen he sometimes took notes, and sometimes trusted to their honor; that no note that witness ever received "shows anything else but the amount of money he received." (Record p. 826.)

Witness further swears that he was more or less acquainted with the

other entrymen in 1883, some only by sight; that John Brandon was employed in the New England Hotel, and some of the others were stopping there.

On redirect examination, Lohr testified that in 1882 and 1883 timber lands were most sought after in Washington (Record p. 850); that there was no agreement or contract with any of said entrymen, or between the entryman and any other party, so far as witness knows, "that after the said final entry the party would sell to" witness "at any specified price, or at all;" that Wayne W. Holcomb is an attorney at law, and had been Representative to the Legislature from Yakima county, in said State; that said Chalcraft was a civil engineer in Seattle, Gilmore was a merchant at Edison, Skagit county, in said State, McBride was a school teacher, and now an attorney at law, all men of good character (Record p. 853); that McBride asked witness to give him a location as a timber claim, and he did so.

On recross-examination Lohr said that he was not asked as to the legal requirements, and took it for granted that McBride knew that he "should not make his entry for the benefit of any other person but himself" (Record p. 855); that Henry Brandon was engaged in driving a delivery wagon for Schwabacher Bros., of Seattle, and is a brother of John E. Brandon, and does not know as to his means (Record p. 857), that he was an honorable trustworthy young man; that Edward Crome was an assistant surveyor, and might have been employed in the New England Hotel in the summer of 1883; that said Wilson was engaged in a restaurant in Seattle; that said Hackley assisted in surveying, and was afterwards a contractor on a road near Lake Washington; that said Rogers was a farmer at Edison; and said Leslie worked in a barrel factory in North Seattle (Record p. 858).

In the examination on the Gilmore entry, on cross-examination, witness said that he bought provisions from Gilmore, and advised him, the same as he would any other friend, to use his timber rights and secure timber lands, as they would be very valuable in the future, told him between April 23 and April 30, 1883, that he could sell his claim to S. S. Bailey, and conducted the negotiations for the purchase of the land for Mr. Bailey (Record p. 872); that Gilmore said that he was the owner of the Stanley and Rogers claims, and if he sold one, must sell all, or words to that effect; that witness remembers that Mr. Bailey told him about a year ago that the United States claimed that Gilmore sold to him before he purchased from the government, and that Mr. Gilmore was willing to rectify by giving another deed (Record p. 875). Witness further swears that he had no interest in the lands deeded by Gilmore to Bailey (Record p. 876); that his interest was not in the lands, but in the profits after the lands were sold (Record p. 878).

In the redirect examination, on the Chalcraft entry, witness swears that there was no contract between said entryman and him, or with any other person, so far as he knows, for the purchase or sale of the land

embraced in his timber entry and prior to the receipt by him of the Land Office receipt for the land " (Record 903).

Lohr further swears that he made H. Brandon the same offer as to others, relative to the purchase of his claim after procuring title (Record p. 907).

In reference to the Crome entry, witness states that he might have loaned the entryman money to pay for his entry, but it was not with any understanding that witness was to become the purchaser after final proof; that this was done as an accommodation, and the land was sold to Bailey in the spring of 1883 (Record p. 920).

Witness conducted the negotiations for the sale of the Stanley and Rogers entries from Gilmore to Bailey, until the price was agreed upon (Record p. 930), and did the same with the Holcomb entry (Record p. 938).

On cross-examination, relative to the Wilson entry, Lohr testifies that the entryman was working in a restaurant, as waiter or bartender, owned by Anderson & Ford, and the witness conducted the negotiations for the sale of his land to Bailey, but does not remember whether he loaned Wilson the money to pay for his entry or not (Record 946).

Witness also conducted the negotiations for the purchase of Hackley's entry, but made no agreement prior to April 30, 1883, the date of his entry. (Ev. 954.) Witness also said on cross-examination, that John E. Brandon was employed as a porter at the New England Hotel, and was also engaged in working at surveying; that witness concluded the negotiations for the sale of his entry to Mr. Bailey for \$605.50. (Ev. 605.) Witness also swears that he located the Leslie entry, was slightly acquainted with Leslie in 1883, and received from him the sum of \$50, for service in location; (Ev. 989) that he negotiated for the sale of said entry to Bailey for the sum of \$573; that he does not remember when Leslie made his final proof, and the negotiations were doubtless on the day of the sale. (Ev. 992.)

After testifying as to each smallest legal subdivision of said entries, witness was further questioned in general, and stated that in the years 1882 and 1883 there were no settlers or settlements in townships 36 and 37 north, ranges 3 and 4 east, and no improvements in the way of wagon roads or railroads; (Ev. 996) that he received no compensation from said entrymen for sale of their land, and none was promised him by them; (Ev. 1,061) that each entryman was at liberty to sell to any one after the completion of his entry. (Ev. 1003).

On general cross-examination, witness was handed an affidavit purporting to have been made by him in June, 1888, relative to his transactions with said Bailey, and he admitted that he signed the same, and that the substance was correct. (Ev. 1006). When his attention was called to the statement in said affidavit that "some of these men gave me a note for the \$50 that I was to receive for locating them, and in those cases the notes specified that in case they desired to sell the land

after making final proof, that I would surrender them the notes, or that they were to be null and void in case I bought their lands," and he was asked why he had testified that the notes contained no stipulations relating to the disposition of said lands, he answered that the affidavit was drawn up in a hurry, and was signed by him without proper perusal; that he did not understand in his conversation that these stipulations were mentioned in the notes taken by him; that his "impression was that they were verbal considerations, or verbal understanding, as a matter of showing my (his) good faith in what I had stated to them. After rereading this affidavit, I find that these are supposed to have been included in the notes as a part of the writing, which I do not remember of as being facts." Ev. (1006-7). He also states that Mr. Bailey asked him to testify in this case, and agreed to pay all of his expenses. (Ev. 1008.)

Witness was asked the following question: "Did it occur to you, when you were locating these entrymen, and subsequently buying up their claims, for the mutual benefit of S. S. Bailey and yourself, that you were operating in direct violation of the spirit of the timber law?" And he answered: "I did not believe that I was violating any law any more than I would buy locations made by other parties, so long as I used due diligence in making purchases when parties had the right to sell according to the advice given me." (Ev. 1010.)

Witness also said that he had been paid by Mr. Bailey his full share in the profits arising from the sale to Hawley and Alger, and had no interest in the result of the trial. (Ev. 1012.)

On re-direct examination, Lohr states that the special agent wrote said affidavit, and he only "skimmed over the first part of it, but took it for granted it was representing what was understood by the conversation at that time;" that there was evidently a misunderstanding on the part of the special agent as to what he said about the contents of the notes given him by persons whom he located.

In addition to these facts and circumstances it must be remembered that Agent Carson had reported these entries as fraudulent; that none of the entrymen were called as witnesses for the transferee, nor was Bailey sworn or offered as a witness in his own behalf.

I have thus stated in detail, and at unusual length, the evidence relating to the alleged fraudulent character of these entries in the transactions between Bailey and the entrymen, for the purpose of making clear the grounds upon which my conclusion is based. At every point Mr. Bailey appears; the conveyances were made to him very shortly after the entries were made; he advanced the money to make the entries in most, if not in all the cases; he was a hotel-keeper; Lohr was to select the lands, find the persons to make the entries, locate them thereon, and Bailey was to pay the expenses; upon the purchase of the land Bailey was to receive a deed for the tract, and Lohr and Bailey were to divide the profits between them. Lohr says this is so

in his affidavit, although it is true he seeks to avoid it when he is put on the witness stand.

All the circumstances satisfy my mind that this was the arrangement. Lohr picked up clerks, bar-tenders, grocery men, school teachers, lawyers, in a word anybody who was willing to make the location, or be concerned in it, for a consideration. They were mostly young men without any permanent abiding place. It is very strange, indeed, if they entered that land for their exclusive use and benefit, that they should have conveyed it to Mr. Bailey on the same day that the entries were made, or within a day or two thereafter, when the evidence shows that he was engineering these entries from the time the parties made the first affidavit until they submitted their final proof in support of their entries. It is very plain to my mind that this was a scheme put up in the first instance by Lohr and Bailey for the purpose of acquiring title to the land for speculative purposes. To my mind this raises an impassable barrier, if the law is to be observed, to the sustaining of these entries.

The purpose and intent of the act was to give every citizen of the United States, or one who has declared his intention of becoming such, the opportunity to purchase one hundred and sixty acres of land under said act, if it was unfit for cultivation, but in every case the entryman is required to act in good faith. But none of the entrymen at the time they made these purchases, did so in good faith in harmony with the spirit and letter of the law.

This holding in no wise conflicts or interferes with the right of a purchaser in good faith of land under the act, after he acquires title, to sell the land if he desires so to do. Sales made soon after purchase, however, if unexplained, have a tendency to arouse suspicion in the mind that when the entry was made, it was not for the entryman's own exclusive benefit and use. And when we find twelve entries made in the manner in which these were made, money furnished by the assignee, engineered by the assignee, deeded to the assignee, and this arrangement made prior to the time the locations were made, I do not see any escape from the conclusion that they were made in violation of the statute, and ought not to stand.

These views do not in any manner conflict with any of the doctrines announced by the supreme court in the case of *United States v. Budd* (144 U. S., 154). In that case patent had issued; the government was undertaking to set aside the patent on the ground of fraud, and the court lays down the rule that *after* the issuance of patent the government must make a much stronger case in order to cancel an entry than before patent; that prior to the issuance of patent the matter is in the hands of the land department and its findings on questions of fact are generally conclusive. The court says:

But after all, the question is not so much one of law for the courts after the issue of patent, as of fact, in the first instance, for the determination of the land officers.

The courts do not revise their determination upon mere questions of fact. In the absence of fraud or some other element to invoke the jurisdiction and powers of a court of equity, the determination of the land officers as to the fact whether the given tract is or is not fit for cultivation is conclusive.

In that case there was the testimony of two witnesses denying the charge that Budd had made a prior agreement with Montgomery, that is Budd and Montgomery each filed sworn answers denying specifically the existence of any such prior agreement; and an answer under oath in an equity case, when called for, as it was in that case, is always to be taken as evidence.

Moreover, in that case the court eliminated from the record all the testimony going to show that the purchaser from Budd had made similar purchases in collusion with other entrymen at the same time and in the same vicinity, which left the government with practically no evidence showing fraud.

In the case at bar, by stipulation, all these cases were to be tried as one, and the testimony touching all these transactions was through this agreement admissible and admitted in the trial of this case.

It is charged, among other things, that those entries were made on speculation and not in good faith by the several entrymen, for the purpose of appropriating the same to their own use and benefit, and yet the purchaser failed at the trial to testify himself, or to introduce any of the entrymen from whom he purchased.

It can not be said in this case, as in the case of Budd, that the government had the right to cross-examine the transferee or the entryman, because none of them were produced as witnesses at the trial, and there was no power on the part of the government to compel their attendance. Their testimony could only be obtained by their voluntary appearance and offering themselves as witnesses, which no man is willing to do when his testimony, truthfully given, will show that he has obtained valuable property in violation of law. The case of Budd was tried in court, where these unwilling witnesses could be compelled to appear and give their testimony.

It is true that since the case has been pending here and very recently, Bailey has offered to testify therein and submit himself to cross-examination. His affidavit, as to what his evidence would be, accompanying this offer, shows that he is prepared to make a denial of any wrongful act in connection with said entries. An affidavit to the same effect, sworn to on June 18, 1891, was already in the record, and therefore the offer was declined. Considering this denial, and giving to it the utmost force and effect, it utterly fails to meet and overcome the preponderating adverse evidence in the record.

Whilst this tardy offer of Bailey, to some extent, may mollify the just criticism made because of his failure to testify in the case at all, the fact remains that the evidence of the entrymen is entirely wanting.

The government can not be charged with laches in not having their

testimony in the record. It can not therefore be said, as in the case in the supreme court:—

If the government, the complaining party, failed to call them, it is to be presumed that upon inquiry it found that they knew nothing that would tend to substantiate its claim.

On the other hand, if these men made their entries for their own use and not on speculation or in collusion with Bailey, there was every inducement on his part to call upon them, and every moral obligation on their part to respond. They were peculiarly his witnesses; their testimony, in connection with his own, could alone overcome the damaging disclosures of Lohr, and, if they were men of good character, as claimed by him, so much the more effective would their testimony have been to show a lack of interest or collusion on his part.

The conduct of the party in omitting to produce that evidence in elucidation of the subject matter in dispute, which is within his power, and which rests peculiarly within his own knowledge, frequently affords occasion for presumptions against him, since it raises strong suspicion that such evidence, if adduced, would operate to his prejudice. (Starkie on Evidence, Vol. 1, p. 54).

There is another clear distinction between the inquiry herein for consideration and the matter at issue in the case of the United States v. Budd. In that case the patent to Budd was sought to be set aside because of an alleged conspiracy between Budd, the entryman, and Montgomery, the purchaser. That is to say, the only matter considered by the court in that case, aside from the character of the land, was, whether the entry of Budd was made in collusion with or in the interest of Montgomery.

In the language of Justice Brewer, who delivered the opinion of the court:

The particular charge is that Budd, before his application, had unlawfully and fraudulently made an agreement with his co-defendant, Montgomery, by which the title he was to acquire from the United States should inure to the benefit of such co-defendant.

The question as to whether Budd's entry was made in good faith to appropriate it to his own use and benefit, and not *on speculation*, appears not to have been in issue, further than that inquiry would necessarily be raised by an investigation confined to Montgomery's connection with the alleged fraudulent entry.

To entitle one to make a timber land entry and purchase he is required to make oath: First, that he does not apply to purchase on a speculation, but in good faith to appropriate the timber to his exclusive use and profit; and, Second, that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons, by which the title which he might acquire from the United States should inure, in whole or in part, to the benefit of any person except himself.

These requirements of the oath are separate and distinct. The entryman could comply with the one and violate the other, and a violation

of either requirement would defeat the entry. For instance, if a person should make an entry, for the purpose of speculation, although he might not offer to sell until after he should receive his final certificate of purchase, yet his entry should be forfeited, and, if a person should make entry in good faith and with no speculative purpose or intention whatever, but if, before receiving final certificate, he should make an agreement or contract to sell, his entry should be forfeited.

The supreme court, in the case of *United States v. Budd*, dealt mainly with one of these requirements of the oath of the entryman—to wit: that the entryman had not sold or agreed to sell the land entered by him in violation of the statute. The other requirement of the oath referred to, that the entryman had not applied to purchase on a speculation, was considered by the court only as it threw light on the main and only real question in that case—to wit: whether a contract or agreement to sell had been made by the entryman that would work a forfeiture of his right to purchase. As a distinct question, affecting the right of the entryman to purchase, the court did not consider the question here made, that the entry originally was for a speculative purpose, whether he had or had not made a contract for the sale of the land to another.

It is clear, therefore, that the case of *United States v. Budd* does not decide the question now under consideration.

Now, if it should be conceded in the cases before me that the testimony of Lohr is insufficient to show that these several entries were made in the interest of or in collusion with Bailey, it seems to me the conclusion can not be avoided that they were made on speculation, and not in good faith to appropriate the lands thus entered to the exclusive use and benefit of the several entrymen.

Lohr shows by his testimony that these several entrymen were engaged in different pursuits, and were induced by him to make these purchases, he telling them that he would buy their claims and give them fifty dollars more than any one else would; that this promise was made to the parties as an inducement to take his word and knowledge as to the quality and quantity of the timber, and that while he does not remember loaning any of these entrymen money, yet it probable he did; that when he did so, he sometimes took notes and sometimes trusted to their honor. By this and other similar testimony he leaves no doubt in my mind that he procured these entries to be made purely on speculation; that none of these entries were made for the purpose of appropriating the land or timber to the use of the entrymen, but on the promise or representations of Lohr that such act on their part would result in a profitable speculation—that is, they would be able to make an immediate sale of the land at a price greatly in excess of the cost to the entrymen.

Entries made in this way and for this purpose are in violation of the spirit and letter of the law; for the applicant to purchase is required

to make affidavit that "he does not apply to purchase the same on speculation."

This interpretation of the statute does not imply that a timber-land entryman is not authorized to sell his entry at any time he may choose after he has made his proof and received his certificate; but when, as in these cases, it is clearly shown that prior to taking any steps to secure the land, they had first satisfied themselves that these entries could be sold at a profit, and thereupon they made their entries for the sole purpose of securing the profit thus in view, to my mind they bring themselves within the inhibition of the statute.

Can it be doubted from all the record in this case that these entries were so made, I think not.

Mr. Bailey's connection with these purchases may be eliminated from the case, and the acts and motives of the entrymen alone considered, and their entries can not be sustained if any meaning is to be given to that part of the statute which forbids the making of such entries "on speculation."

I am aware that in the case of the *United States v. Budd*, the court used language indicating that nothing short of an actual prior agreement to sell can disturb the entry. But it must be remembered that in that case a "prior agreement to sell" was the sole issue of fraud on trial, and when Justice Brewer announced that "all it (the law) denounces is a prior agreement," etc., the language must be considered with reference to the matter at issue—namely, whether there was such an agreement between Budd and Montgomery.

Here, the government is inquiring into all matters connected with these entries, and is not limited, as in that case, to the issues made by the pleadings.

The decision of your office sustaining these entries is reversed, and you are directed to cause said entries to be canceled.

PRACTICE—APPEAL—NOTICE—SERVICE BY MAIL.

OREGON CENTRAL MILITARY WAGON ROAD CO. *v.* HART.

Notice of an appeal must be served on the opposite party within the time allowed by the rules of practice for taking an appeal, and if not duly served within said period the appeal may be properly dismissed.

Mailing a notice of appeal prior to the expiration of the time allowed for appeal, is not the service of notice required, if in due course of the mail the notice could not be received by the opposite party until after the expiration of said period.

Secretary Smith to the Commissioner of the General Land Office, October 23, 1893.

The attorneys for the Oregon Central Military Wagon Road Company have filed a motion for review of the departmental decision of the

11th day of April, 1893, in the case of said company *v.* Richard H. Hart, involving the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 11, T. 30 S., R. 46 E., Lakeview, Oregon, land district.

On the 15th day of May, 1891, your office decided that this land was excepted from the grant to said company, and notice of said decision was given the company through its resident attorneys, in accordance with rule 97 of Rules of Practice.

The time for taking an appeal and serving notice thereof commenced to run on the 17th day of May, 1891, and would expire on the 16th day of July, 1891. The evidence of the service of the appeal consisted of an affidavit of one Cook, showing that on the 14th day of July, 1891, he mailed at Washington, D. C., a copy of the appeal, directed to R. H. Hart at Lakeview, Oregon. Hart made a motion to dismiss the appeal, on the ground *inter alia*, that no legal notice had been given him within the time allowed for the filing of the same.

The grounds of the motion for review are as follows—

First:—In dismissing the appeal of the Oregon Central Military Wagon Road Company, when said company filed said appeal within sixty days after notice of the decision appealed from, and after notice thereof had been duly served on Hart, within said sixty days.

Second:—In dismissing the appeal of said company when it is admitted in the decision of dismissal, that the decision appealed from, was rendered on May 15, 1891; that the time did not begin to run against said company until after May 17, 1891; that notice of the appeal was served on Hart on July 14, 1891; that the sixty days did not expire until July 15, 1891, and when it appears that the appeal was filed on July 15, 1891, within the time allowed for taking said appeal.

Third:—In holding that the notice of appeal was not served on said Hart within the time allowed for taking an appeal, when the recitals in said decision of dismissal show that said notice was served on said Hart on the fifty-ninth day after the notice of the decision from which the appeal was taken, which was within the sixty days allowed for appeal by the rules of the Department.

Fourth:—In holding that it was necessary to mail the notice of appeal to Hart in time to reach him before the expiration of sixty days allowed for appeal, when it was only necessary to mail said notice within said sixty days.

Fifth:—In holding that the case of *Bundy v. Fremont Townsite* (9 L. D., p. 276) was authority for dismissing said appeal when in that case the service by registered letter was distinctly recognized as the date of service, which evidently meant the date of mailing the notice and not the date of its reception by the attorney.

Sixth:—In not holding that the service of notice of the appeal upon Hart on July 14, 1891, by registered letter was in apt time, and in not holding that the appeal was properly taken and in due time.

Seventh:—In holding contrary to the law.

The Department found that the notice of the appeal "was mailed one day prior to the expiration of the time allowed for appeal, and that in due course of the mail could not have been received by the claimant until several days after the expiration of the sixty days allowed by the rules."

These facts are not controverted by the motion, nor in the argument filed in its support; but it is in effect contended that the *filing* of the appeal, and *mailing* the notice of it within the sixty days allowed for

the taking of appeals constituted a compliance with the rules of practice respecting the time of taking and serving notice of appeals.

Rule 86, of the Rules of Practice, requires that—"Notice of an appeal from the Commissioner's decision must be filed in the General Land Office and served on the appellee or his counsel within sixty days from the date of service of notice of such decision."

The language of this rule is so plain in requiring the motion to be served within the time allowed, that it would seem to be a useless waste of words and time to attempt to make it plainer and more specific.

Rule 93 requires that—"A copy of the notice of appeal, specification of errors, and all arguments of either party, shall be served on the opposite party within the time allowed for filing the same." This language, likewise, very clearly specifies the time within which service is required to be made and completed.

Rule 94 requires—"such service to be made personally or by registered letter."

Rules 95 and 96 relate mainly to the manner of making the proof of service, and not to the service itself, nor the time within which it is to be made

Succinctly and chronologically stated, Rules 86 and 93 fix and determine the time within which notice of appeal shall be served upon the appellee; Rule 94 fixes the character of the service, to wit: "personally or by registered letter;" and Rules 95 and 96 define the kind of proof that is required to establish the fact that service was made within the time and in the manner required.

It is clear in this case that the mailing of the notice of appeal and specifications of error at the city of Washington, D. C., one day before the expiration of the time required, addressed to Hart at Lakeview, Oregon, would not constitute service upon him in accordance with the rules of practice, for it is not contended or pretended that he could possibly have received it at the place where it was directed the next day after it was mailed, or that he in fact did receive it in that time.

It is claimed in argument that the motion to dismiss the appeal was not served on the appellant, and that the Department erred in entertaining it for that reason, and in support of the claim. *Kimbel v. Henry* (9 L. D., 619) is cited as authority. That case seems to hold that a motion to dismiss an appeal on the ground that no notice of appeal, specifications of error, or copy of brief was served upon the appellee, cannot be entertained. I think it was intended to hold that no action would be taken upon such a motion, in the absence of service on the appellant, where the action would injuriously affect his rights in advance of the time when the case should be reached in its regular order for final disposition on the merits. At that time, as was evidently the fact in the case at bar, such a motion may be considered for the single purpose of calling the attention of the Department to the failure of the appellant to comply with the rules of practice in the matter of serv-

ing notice of his appeal, and, further, as an objection on the part of the appellee to the prosecution of the appeal.

Aside from these considerations, however, there was no error in the action of the Department in dismissing the appeal in this case, for under the facts it was quite evident that notice of the appeal had not been duly served on the appellee, as required by the rules of practice, and the failure to so serve notice was of itself sufficient grounds for dismissing the appeal under the repeated rulings of the Department. See *Groom v. M., K. & T. Ry. Co.* (9 L. D., 264); *Bundy v. Fremont Townsite* (ib., 276); *Huntoon v. Devereux* (10 L. D., 408); *Brake v. California and Oregon R. R. Co.* (11 L. D., 249); *Charles A. Parker* (ib., 375).

The supposed extreme cases used as illustrations in counsel's argument, where hardship might arrive by reason of the time for taking appeals, under the rules of practice, can all be met by a compliance with the rule announced in the case of *Haffey v. States* (14 L. D., 423) wherein it was said that—"Where an extension is necessary, application therefore should be addressed to your office, and be presented before the time for appeal allowed by the rules has expired."

This provision is ample in my judgment to meet all cases likely to arise, and it should not be extended in any case so as to make the failure to serve notice of appeal within the time required by the rules a ground for rehearing or review. For the foregoing reasons the motion must be, and hereby, is denied.

DOUGHERTY v. BUCK.

Motion for review of departmental decision of February 24, 1893, 16 L. D., 187, denied by Secretary Smith, October 23, 1893.

SOLDIERS' ADDITIONAL ENTRY—CONFIRMATION.

JESSE P. PARRISH.

A deed executed prior to March 1, 1888, in the name of and purporting to convey the interest and title of one holding a power of attorney from another, in whose name a soldiers' additional entry has been made by such attorney in fact, is not proof of a sale of the land that brings the entry within the confirmatory provisions of section 7, act of March 3, 1891; nor will a deed executed subsequently by the principal and based on an additional consideration operate to cure the defects in the former conveyance so as to bring said entry within the terms of said section.

Secretary Smith to the Commissioner of the General Land Office, October 23, 1893.

On November 9, 1878, your office issued a certificate to Jesse P. Parrish, stating that he "is entitled to an additional homestead entry

of not exceeding eighty acres, as provided in section 2306 Revised Statutes of the United States." This right was based upon original homestead entry No. 7622, at Boonville land district, Missouri, and his service as a soldier in Company "I," Osage county regiment, Missouri Home Guards.

It appears that on August 22, 1884, Louis Autenrieth, as the attorney in fact of said Parrish, entered the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 34, T. 36 N., R. 5 W., Shasta, California, and final certificate No. 535 was duly issued.

On August 29, seven days after the entry, the same was held for cancellation, for the reason that the soldier did not appear in person at the local office to make the entry, as required by circular of February 13, 1883. On October 20, 1884, your office appears to have revoked the order of August 29, for the reason that the order holding the entry for cancellation should have been made for a different reason—namely: that the additional homestead right was based upon military service in the Missouri Home Guards. The entry was again held for cancellation (October 20, 1884), and sixty days allowed for appeal, etc. An appeal was taken from that decision, but was returned from this office without action, on December 10, 1884, by reason of the act of May 15, 1886 (24 Stat., 23), providing for certificates of discharge to be issued to members of the Missouri Home Guards.

By office letter ("C") of December 3, 1888, addressed to Henry Beard, Esq., of this city, the former ruling was adhered to—namely: that members of the Missouri Home Guards were not entitled to soldiers additional entries under section 2306 of the Revised Statutes, citing departmental decisions in support of the ruling.

From that judgment the case was brought by appeal to this Department by your letter of February 9, 1889.

Lengthy arguments have been filed endeavoring to show the right possessed by members of the Missouri Home Guards to the provisions of section 2306 of the Revised Statutes; but it is needless to notice these arguments in view of the late decision in the case of Smith Hatfield *et al.* (17 L. D., 79), where it was again held, after very careful consideration, that the right to make soldiers' additional entry does not extend to members of that organization.

It is insisted, however, that the entry is now confirmed under section 7 of the act of March 3, 1891, for the reason that the land covered by entry was sold prior to March 1, 1888, to a *bona fide* purchaser for a valuable consideration.

A certified transcript from the original records of Shasta county, California, under the hand and seal of T. B. Smith, county clerk and ex-officio county recorder, shows that Jesse P. Parrish, on August 21, 1878, executed and acknowledged a power of attorney to L. Autenrieth "to locate at any land office in the United States any land that I may be entitled to enter under the provisions of section 2306 of the

Revised Statutes of the United States," etc., also "to receive the duplicate certificate of such entry, and to demand and receive any receipt for the patent that may be issued," etc. There is also filed a copy of a power of attorney given by Parrish to L. Autenrieth on the same day (August 21, 1878), which reads as follows:

KNOW ALL MEN BY THESE PRESENTS, That we, Jesse P. Parrish and Mary Parrish, wife of the said Jesse, of the county of Camden, State of Missouri, do hereby make, constitute and appoint L. Autenrieth my true and lawful attorney, hereby authorizing and empowering my said attorney to sell, upon such terms as to him shall seem meet, any lands which I now own, either in law or equity, and obtained by me as an "additional homestead," under the provisions of section 2306 of the Revised Statutes of the United States, and to sell any such lands as I may hereafter acquire under said acts, and to receive the purchase money, or other consideration therefor, and upon such sale to make, sign, seal and deliver in my name all such deeds, or other assurances in the law therefor as to him shall seem meet and necessary.

AND I further authorize and empower my said attorney to receive, accept and take possession of all lands hereinbefore mentioned, and to prosecute and defend at his own cost, any suit or action respecting the same, or for the breach of any contract in relation thereto or for any trespass thereupon, or injury thereto, of any nature or description whatsoever.

AND my said attorney is hereby authorized to sell said lands, or any interest therein, and to make any contract in relation thereto, which I might make if present; and to receive for his own use and benefit any moneys or other property the proceeds of the sale of said lands, or any interest therein, or arising from any contract in relation thereto, or received or recovered for any injury thereto and I hereby release to my said attorney all claim to any of the proceeds of any such sale, lease, contract, or damages.

AND I further authorize my said attorney to appoint a substitute or substitutes to perform any of the foregoing powers.

AND IN CONSIDERATION of the sum of one hundred dollars, lawful money to me in hand paid by the said attorney, the receipt whereof is hereby acknowledged, this power of attorney and each and every power contained herein is made and hereby declared to be irrevocable by me or in my name or otherwise. The lands hereinbefore referred to are the following, viz: the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 44, T. 36 N., R. 5 W. of Mt. Diablo B & M.

Hereby ratifying and confirming all that my said attorney or his substitute may lawfully do or cause to be done by virtue of these presents.

IN WITNESS WHEREOF, I, the said Jesse P. Parrish and Mary Parish, the wife of said Jesse P. Parrish, in token of her release of all rights of dower and homestead exemption in the premises, have hereunto set our hands and seals this 21st day of August, 1878.

This power of attorney appears to have been acknowledged before one John H. Holloway, a justice of the peace, on the day it was executed, and it was recorded in Shasta county, California, August 11, 1893, "at the request of Wells Fargo and Co.," as certified to by the county recorder.

There is also filed a copy of a quitclaim deed from Louis Autenrieth to the Pacific Improvement Company, dated August 24, 1884, conveying the land in question to said company for the consideration of one dollar.

An instrument is also filed, signed by Jesse P. Parrish and Lydia Parrish, and acknowledged on April 12, 1893, before Ousley Claiborn, as notary public in the county of Camden and State of Missouri. This instrument recites the power of attorney given by its makers to Louis Autenrieth on August 21, 1878, to sell the land. It also recites the sale of said land by Autenrieth to the Pacific Improvement Company on August 23, 1884. In consideration of the premises, the makers of the instrument "do hereby confirm and perfect the deed of said Louis Autenrieth, and release and quitclaim all of their right, title, and interest in and to said land to the Pacific Improvement Company.

It is stated in an affidavit made by F. S. Douty, secretary of the Pacific Improvement Co., on August 10, 1893, that "said company purchased from Jesse Parish and wife, through their attorney in fact L. Autenrieth, in good faith and for a valuable consideration" the land (describing it); that affiant

subsequently and on behalf of said Pacific Improvement Company and for its account paid to said Jesse P. Parish the further sum of \$500 for said land and for all of his interests therein; that said payment was made to said Parrish *for the purpose of curing possible defects in the transfer made by said L. Autenrieth*, attorney in fact of said Parrish to said Pacific Improvement Co. and for the purpose of perfecting title to said company.

Conceding that the power of attorney given by Parrish and wife to Autenrieth on August 21, 1878, conferred on the latter power to sell realty, which the forner did not then possess, and under the law, as now construed, never could possess, still it was nothing more nor less than it purported to be, namely: "to sell upon such terms as to him shall seem meet any lands which I now own . . . and to sell any lands which I may hereafter acquire under said acts."

Sec. 2306 Revised Statutes).

The deed, from Autenrieth to the Pacific Improvement Company, reads as follows:

This indenture, made the twenty-third (23rd) day of August in the year of our Lord one thousand eight hundred and eighty-four (1884), between Louis Autenrieth of the county of Shasta and State of California, party of the first part, and the Pacific Improvement Company, a corporation under the laws of the State of California, party of the second part,

Witnesseth: That the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to him in hand paid, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, quit claimed and conveyed, and by these presents does grant, bargain, sell, remise, release, convey and quit claim unto the said party of the second part, and to its heirs and assigns forever, all the right, title and interest, estate, claim and demand; both in law and equity, as well in possession as in expectancy, of the said party of the first part, of, in and to that certain property, situated in the county of Shasta, State of California, and described as follows, to wit:

The north half of the northeast quarter of section thirty-four (34), in township thirty-six (36), north of range five (5) west, M. D. M., containing eighty acres of land;

Together with all the rights, privileges and franchises thereto incident, appendant or appurtenant or therewith usually had and enjoyed; and, also, all and singular the tenements, hereditaments and appurtenances thereunto belonging, and the rents, issues and profits thereof; and, also, all the estate, right, title, interest, possession, claim and demand whatsoever, of the said party of the first part, of, in or to the premises, and every part and parcel thereof.

To have and to hold all and singular the premises, with the appurtenances and privileges thereto incident unto the said party of the second part, its heirs and assigns forever.

And the party of the first part, for himself and his heirs, doth hereby agree to and with the party of the second part and its heirs and assigns, that he has full right and power to give such quit claim deed of said premises; and that the said premises are now free and clear from all incumbrances, sales or mortgages, made or suffered by the party of the first part.

In witness whereof, said party of the first part has herennto set his hand and seal this day and year first above written.

(Signed)

L. AUTENRIETH [SEAL].

Sealed and delivered in presence of

WILLIAM HOOD.

By reference to this deed, it will be seen that Autenrieth does not profess to act for and in the name of Parrish, nor to convey the land as the property of Parrish—it only purports to convey such an interest in the land as Autenrieth then possessed. All the power he had, if any, was to convey “in my (Parrish’s) name any such land as I may hereafter acquire.” In form, it was the deed of Autenrieth, and not the deed of Parrish, by his attorney in fact. It did not convey Parrish’s interest in the land. It can not be claimed that the power of attorney given by Parrish to Autenrieth, whereby the latter was only empowered “to make, sign and seal and deliver in my (Parrish’s) name all such deeds . . . as to him shall seem meet,” was a conveyance of the land; until such deed was made, executed, and delivered in Parrish’s name, or until Parrish in his own proper person made and delivered such deed, the interest, if any, still remained in the latter. See case of Echols v. Cheney, 28 Cal., 157.

In the case of Love v. S. N. L. W. & M. Co., 32 Cal, 651, it is said:

It is a rule of conveyancing, long established, that deeds executed by an attorney or agent must be executed in the name of the constituent.

And section 1095 of the California Code (1886) provides that:

When an attorney in fact executes an instrument, transferring an estate in real property, he must subscribe the name of his principal to it and his own name as attorney in fact.

Section 7 of the act of March 3, 1891 (26 Stat., 1095), provides that “all entries made under the pre-emption, homestead, desert-land or timber-culture laws, in which final proof and payment have been made and certificate issued, and to which there are no adverse claims originating prior to final entry, and which may have been sold or encumbered prior to the first day of March, 1888, and after final entry to

bona fide purchasers or encumbrancers for a valuable consideration," shall be confirmed, unless fraud has been found, &c.

And so the Department has held that soldiers' additional homesteads based upon service in the Missouri Home Guards may be confirmed in the interest of a bona fide transferee. (*United States v. Coonsy*, 14 L. D., 457; *Joseph Rush et al.*, *idem.*, 522; *Alexander H. Plemmons*, *idem.*, 649.)

The consideration for the conveyance of the land from the company to Autenrieth was for the nominal sum of one dollar. It was also a quitclaim deed, and the purchasers were charged with notice of all defects in the title. The only covenant in this deed is where "the party of the first part, for himself and heirs, doth hereby agree to and with the party of the second part . . . that he has full right and power to give such quitclaim deed of said premises, and that said premises are free from all encumbrances, sales, etc., . . . made by the party of the first part." The deed no where recites the power given to Autenrieth to sell, nor does it affirmatively appear that the company knew of the existence of such power; on the contrary, it would appear that the company accepted the conveyance as from one having some individual right to the land.

The phrase in the act above quoted, namely: "and which may have been sold or encumbered prior to the first day of March, 1888," certainly contemplates that a sale shall have been made by the entryman or by some one properly authorized in his name, and so the Department in its instructions of May 8, 1891 (12 L. D., 450), says:

The proof of sale or incumbrance prior to March 1, 1888, should be clear and satisfactory, and to that end should consist of the original deed or mortgage from the entryman, and also all deeds showing title in the present claimant, or certified copies of such instruments, or a certified abstract of the proper records, showing the chain of title back to the entryman, etc.

There is no sufficient evidence that this land was sold by the entryman before March 1, 1888; nor can the instrument, executed by Parrish and his wife (above alluded to), dated April 12, 1893, be accepted to prove such sale. It was made (as averred) on the consideration of \$500, paid by the company to Parrish; it purports to convey all Parrish's interests in the land, but it was made after March 1, 1888. It could not cure "the possible defects."

There being no sufficient evidence that the land was conveyed before March 1, 1888, the motion for confirmation, under the act of 1891, *supra*, must be and it is hereby denied. It follows that the entry must be canceled. It is so ordered, and the decision appealed from, is accordingly affirmed.

REPAYMENT—ENTRY ERRONEOUSLY ALLOWED.

W. W. WISHART.

Where final proof is accepted by the local office and the entry allowed, but on subsequent examination of the same proof, by the General Land Office or the Department, it is held insufficient, the entry is "erroneously allowed" within the meaning of the statute providing for repayment.

Secretary Smith to the Commissioner of the General Land Office, October 23, 1893.

I am in receipt of your office letter ("M") of August 26, 1893, wherein it is stated that the application of W. W. Wishart, for the return of the purchase money paid on Devil's Lake, North Dakota, pre-emption cash entry No. 731 for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ Sec. 19, T. 154 N., R. 65, was rejected by your office on the 16th day of August, 1893, because "the entry was not erroneously allowed."

Your said office letter gives a history of this entry, including departmental action thereon, finally canceling the same, and concludes as follows:

Under the law and ruling of the Department governing the return of purchase money, repayment of the purchase money could not be made but in equity, I am of the opinion that claimant should not be made to forfeit both the land and the purchase money.

In presenting this case, I would recommend that such instructions be issued as would define in what particular cases, in which equity seems to favor the entryman, repayment could be granted.

It often happens in the administration of the land laws that an entryman loses both the land and the purchase money, as in cases where the land is subject to entry and the proof showed a compliance with law, and it afterwards turns out that such proofs were false. Repayment of purchase money can only be made when the same is authorized by law; and the fact that "equity seems to favor the entryman" would be no sufficient grounds to authorize repayment, unless the law, as well as equity, combine to make such action justifiable.

Since repayment is not authorized solely from equitable considerations, no instructions can well be issued defining "in what particular cases, in which equity seems to favor the entryman, repayment could be granted. At all events, it is deemed best to await the determination and definition of such cases, when they shall regularly arise on appeals from your office rejecting such equitable claims.

It may be stated, however, that when the local officers decide that the proofs presented show a sufficient compliance with the land laws, and a certificate is issued to that effect, and the money is paid for the land and a receipt given therefor, and when a further examination of the same proofs by your office or this Department results in a different judgment, showing that the local officers were in error in admitting the

sufficiency thereof and allowing the entry, the same has been "erroneously allowed" within the meaning of the 2d section of the act of June 16, 1880 (21 Stat., 287), and repayment in such case is authorized. Hudson Mining Company, 14 L. D., 514; Oscar T. Roberts, 8 L. D., 423.

From the history of this case, as set forth in departmental decision of August 27, 1891 (13 L. D., 211), denying Mr. Wishart's motion for review, it would seem that his application for repayment falls within the rule above given and should be governed thereby. If that be true, repayment is authorized "under the law and ruling of the Department."

The case not being here on appeal, you will take such steps in the premises as in your judgment the facts warrant, in the light of the above rule.

PAWNEE INDIAN LANDS—FORFEITURE.

INSTRUCTIONS.

Purchasers of Pawnee Indian lands who have not made their payments of principal and interest, as required by the supplemental act of April 22, 1890, but have since the time fixed in said statute tendered payment, may be permitted, in the absence of a declaration of forfeiture, to complete their purchases.

Forfeiture declared as to all entries of said lands remaining in default with directions given for new sale.

Secretary Smith to the Commissioner of the General Land Office, October 23, 1893.

With your office letter of August 2, 1892, report was made of those persons in default in payment of the purchase money on Pawnee Indian lands in Nebraska, in order that action might be taken as contemplated by the act of April 22, 1890 (26 Stat., 60).

These lands were sold under the act of April 10, 1876 (19 Stat., 28), which required that one-third of the purchase price be paid at the time of sale, the balance to be paid in two equal annual payments, with interest at six per cent per annum from the date of sale.

A number of the purchasers were in default in payment of principal and interest, and by the act of April 22, 1890 (*supra*), it was required that all purchasers of lands in said reservation in default shall make—

Full and complete payment therefor to the Secretary of the Interior within two years from the passage of this act, and any person in default thereof for a period of sixty days thereafter shall forfeit his right to the lands purchased and any and all payments made thereon.

Your office report shows that at the expiration of the time named in the statute default existed on seventeen entries, but that payment had been since offered on six entries.

I find that in a communication, addressed to Hon. A. S. Paddock, dated August 2, 1892 (L. & R. Misc. Press copybook No. 250, p. 82), relative to these entries, it was held that the statute is mandatory, and that this Department is powerless "to relieve these parties against their default."

In the matter of the disposition of the Omaha Indian lands, the third section of the supplemental act of May 15, 1888 (25 Stat., 150), provides that:

The Secretary of the Interior is hereby directed to declare forfeited all lands sold under said act upon which the purchaser shall be in default, under existing law, for sixty days after the passage of this act, in payment of any part of the purchase-money, or in the payment of any interest on such purchase-money for the period of two years previous to the expiration of said sixty days. The Secretary of the Interior shall thereupon without delay cause all such land, together with all tracts of land embraced in said act not heretofore sold, to be sold by public auction, after due notice, to the highest bidder over and above the original appraisal thereof, upon the terms of payment authorized in said act. And the proceeds of all such sales shall be covered into the Treasury, to be disposed of for the sole use of said Omaha tribe of Indians, in such manner as shall be hereafter determined by law.

Acting under this section, forfeiture was declared of all claims in default by departmental communication, dated August 31, 1889, addressed to your office (9 L. D., 326).

Among the claims reported for forfeiture was that of one Edward Uhlig, but, as it afterwards appeared that on August 2, 1889, after the time named in the act, but before forfeiture was declared, he had tendered full payment upon his claim, he was permitted to complete the same, and the declaration of forfeiture was set aside and held for naught as to the land covered thereby. (12 L. D., 111.) In that case it was said:

From the language of this act, it is apparent that although the purchaser may be in default within the meaning thereof, yet before he can be divested of his rights in the land a forfeiture must be declared by the Secretary of the Interior. This declaration of forfeiture is in the nature of a judgment at law, or a decree in equity divesting the purchaser of all right and title to the land. Neither courts of law nor equity favor penalties or forfeitures, and it is, I believe, the universal practice in courts of law to allow the defendant to avoid a forfeiture of his rights by payment of the demand and accrued costs at any time before judgment is rendered, while courts of equity in many cases allow such payment even after the decree and before sale thereunder.

And it has been the practice of this Department, when no rights but those of the claimant and the government are concerned, to allow the claimant to cure his laches at any time before cancellation or other forfeiture is declared.

This reason applies with equal force to the statute under consideration, and all persons in default who have, prior to the date hereof, offered to complete their purchases, will be permitted to do so.

As to the remaining entries, it is accordingly declared that the lands covered thereby, together with all payments made thereon, are declared forfeited, and you will proceed at once to prepare for my approval notices for the sale of such lands at public auction, as provided for in

the 2d section of the act of April 22, 1890—one half of the purchase money to be paid at the time of sale, the balance to be paid within twelve months thereafter—with a clause of absolute forfeiture in case of default.

SURVEY OF PUBLIC LANDS—INDIAN RESERVATION.

TERRITORY OF ARIZONA.

The cost of surveying public lands and properly marking the boundary line necessary to the segregation thereof from an Indian reservation is properly payable out of the appropriation for the survey of public lands, even though in making said survey, coincidentally, the boundary line of said reservation is surveyed. The surveyor general should give notice of proposed public surveys and invite bids therefor.

Secretary Smith to the Commissioner of the General Land Office, October 24, 1893.

I am in receipt of your letter of July 20, 1893, transmitting copies of letters from the surveyor general of the Territory of Arizona, dated June 14, 1893, and July 5, 1893, and your letter of June 26, 1893, to the surveyor general for Arizona. In your said letter of July 20, 1893, you say—

In the event of the Department construing the terms of the first subdivision of section 4 as warranting the award of contracts for the surveys therein referred to, authority is requested to allow the maximum rates of mileage (\$18, \$15, \$12) for the survey of the specific lines detailed in the estimates of the surveyor-general, per his letter of July 5, 1893. It will be observed that said estimate provides for surveying twenty-four miles of the amended boundary line of the reservation at \$30 per mile, amounting to \$720.

In view of the recent decision of the First Comptroller declining to pay for the survey of an Indian boundary line from the appropriation for the survey of the public lands, it is respectfully submitted whether or not the expense of surveying said line can properly be paid from the appropriation for public surveys for the current fiscal year.

I hold that the execution of the surveys referred to in the act approved February 20, 1893 (27 Stat., 469), are warranted by first subdivision of section 4 of said act. The amended boundary line referred to in your letter, constitutes but a very small *part* of the western boundary line of the White Mountain Apache Indian reservation, and is in reality as indispensable and important a boundary line for purposes of subdivision and description of the lands in question as are the meander lines of Salt River. Therefore, the cost of surveying and properly marking the boundary line of these public lands, actually necessary to close the line of survey thereon, and to segregate the same from an Indian reservation, should be paid for out of the appropriation for the survey of the public lands for the current fiscal year, even though in making said survey, coincidentally, the amended boundary of the reservation be surveyed.

In his letter of June 14, 1893, the surveyor-general, reporting upon the surveys referred to in your letter of July 20, 1893, suggests that the two surveys be included in one contract. I can see no objection to that recommendation.

In consideration of the character of the land over which the lines of the proposed surveys must pass, you will direct the surveyor-general for Arizona to give notice of the surveys under consideration, and invite bids and award a contract, or contracts, for the execution of said surveys and resurveys, to a competent and reliable surveyor, or surveyors, at rates of nine dollars for standard, meander and boundary, seven dollars for township exterior, and five dollars for subdivision and connecting lines, per linear mile, where the lines of survey pass over ordinary lands, and at rates not exceeding thirteen dollars for standard, meander and boundary, eleven dollars for township exterior, and seven dollars for subdivision and connecting lines, per linear mile, passing over lands that are heavily timbered, mountainous, or covered with dense undergrowth, and rates not to exceed eighteen dollars for the survey and resurvey of standard, meander and boundary, fifteen dollars for township exterior, and twelve dollars for subdivision and connecting lines, per linear mile, where exceptional difficulties exist along the lines of survey, when the work cannot be contracted for at lower rates, per act of March 3, 1893 (27 Stat., 592), chargeable to the apportionment made to Arizona of the appropriation for the survey and resurvey of the public lands for the current fiscal year.

HOMESTEAD—ADJOINING FARM ENTRY.

GARDNER *v.* MARTIN.

The sale and abandonment of the original farm, prior to submission of final proof under an adjoining farm entry, defeats the right to perfect such entry.

First Assistant Secretary Sims to the Commissioner of the General Land Office, October 27, 1893.

I have considered the appeal of Jacob M. Martin, from your office decision of May 28, 1892, holding for cancellation his adjoining farm entry for the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 33, T. 57 R. 17 W., Boonville, Mo.

There is no dispute about the material facts in this case. At the time the entryman made his entry he was duly qualified, and was residing on his original farm. He continued to reside upon this original farm, improving and cultivating the adjoining farm, until August, 1889, when he removed from his original farm with his family, and sold the same in October or November following, but he states that he did not give the purchaser possession until March 1, 1890.

He submitted final proof for the adjoining farm on March 14, 1890, which was rejected by the local officers for the reason that he had abandoned the land prior to the time of offering said proof.

At the hearing held September 26, 1891, Martin, the entryman, testified as follows:

I have paid for all the improvements on the homestead in money and work, outside of what I have done myself, I have exercised ownership over this land and these improvements since the date of my entry. I have not abandoned the land or improvements. I have made effort to make final proof by commuting to cash by sending a check for the money to the land office at Boonville, Mo. Since that time I have cultivated and improved the land, and have had during all this time some personal effects on the land.

The foundation of Martin's entry, for the tract now under consideration, rests upon the fact that he was an actual bona fide resident on the adjoining land, designated as his original farm. The tract entered by him became subject to all the provisions of the homestead law. The very foundation of a final, or a commuted homestead entry, is residence upon the land, and that residence must be continued until final entry is made. It is true, that in some instances, final proof and entry have been allowed when the applicant was temporarily absent from the land, but in such instances a constructive residence was maintained. In the case under consideration, so far as residence is concerned, it was wholly abandoned eight months or more before final proof was offered, and the party was not legally qualified to submit such proof.

His attempted or actual control or possession of the land, gave him no right to the same under the homestead law, in the absence of residence.

Said decision is justified by the law and the facts in the case, and is approved.

PRACTICE—APPEAL—REJECTION OF DECLARATORY STATEMENT.

MCKERNAN *v.* BAILY.

(On Review).

The failure of a pre-emptor to appeal from the rejection of a declaratory statement defeats all rights that might have been secured thereunder by proper diligence; and such failure to appeal is not excused by the fact that the title to the land was erroneously believed to not be in the United States.

Secretary Smith to the Commissioner of the General Land Office, October 23, 1893.

On the 12th day of April, 1893, this Department, in the case of Elsie A. McKernan *v.* Ella F. Baily (16 L. D., 368), involving the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 11, T. 5 N., R. 35 W., Marquette, Michigan, affirmed your office decision, approving the final proof of Miss Baily and recommending the cancellation of McKernan's entry, so far as in conflict with Baily's claim.

Your office letter of May 31, 1893, transmits a motion for review of said departmental decision, properly filed by attorneys of plaintiff McKernan.

The alleged error complained of in plaintiff's motion for review is fully stated in the second head-note of the decision referred to, as follows:

Failure of a pre-emptor to appeal from the rejection of his application will not preclude his subsequent assertion of priority of right as against another, where at the date of such action the title to the land was erroneously believed to not be in the United States.

The land in controversy was included in the operation of the forfeiture act of March 2, 1889 (25 Stat., 1008), which provides:

That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to the State of Michigan, by virtue of an act entitled An act which are opposite to and coterminous with the uncompleted portion of any railroad, to aid in the construction of which said lands were granted or applied, and all such lands are hereby declared to be a part of the public domain.

The plaintiff and defendant in this case had each sought to acquire title to the land in controversy, prior to its restoration to the public domain, but as neither one could acquire any rights thereby, it is unnecessary to make further mention of it.

I will recite so much of the history of the case, only, as is necessary to show the legal status, respectively, of the plaintiff and defendant therein.

On April 10, 1889, Miss Baily made tender of a pre-emption declaratory statement, which was rejected and she took no appeal.

On May 1, 1889, Miss McKernan offered a homestead application, covering the land in dispute, which was held by the local officers awaiting final action by the Department on said forfeiture act. It appears further that after the passage of the act above mentioned, Miss McKernan made settlement on the 7th and Miss Baily on the 8th day of March, 1889.

On May 11, 1889, Miss Baily offered pre-emption declaratory statement for the same land covered by her previous statement, which was also held for action of the Department.

On September 12, 1890, homestead entry of Miss McKernan and declaratory statement of Miss Baily were made and filed simultaneously. Afterwards, Miss Baily offered final proof in support of her claim, and Miss McKernan protested against its allowance. The local officers found in favor of Miss Baily and recommended the cancellation of McKernan's entry, so far as in conflict with Baily's claim.

Did Miss Baily, by failing to appeal from the action of the local officers rejecting her declaratory statement, lose all rights which might have been perfected by diligence?

If we are to follow the unbroken line of precedents heretofore observed by this Department, we can not escape the conclusion that she did.

When Miss Bailly tendered her declaratory statement on the 10th of April, 1889, the land involved belonged to the public domain by the terms of the act of forfeiture herein before mentioned, and the fact that "the title to the land was erroneously believed to not be in the United States" is no excuse for a failure to pursue the remedy of appeal. (See *Hering v. Snow*, 3 L. D., 473; *Bishop v. Porter*, Id., 103; *Cook's case*, 4 L. D., 187; *Binegar v. Barnstock*, Id., 532; *Smith v. Green*, 5 L. D. 262; *Drummond v. Reeve*, 11 L. D., 179; *Parker v. Gray*, 11 L. D., 570; *Stone's case* 13 L. D., 250; *Hale's case*, 13 L. D., 365).

The motion for review is therefore sustained, and the decision complained of is hereby set aside, and your office decision of May 13, 1892, in said case is reversed.

TIMBER LAND—ADVERSE SETTLEMENT CLAIMS.

HAMMEL v. SALZMAN.

The right to purchase timber lands under the act of June 3, 1878, is not defeated by the prior adverse settlement claim of a homesteader, if such claim is not made and maintained in good faith by the settler.

First Assistant Secretary Sims to the Commissioner of the General Land Office, November 1, 1893.

This case involves lots 1, 2, 3, and 4, of Sec. 30, T. 1 N., R. 6 E., Oregon City land district, Oregon.

The record shows that on October 19, 1891, Charles Salzman filed his homestead application for the above described tract, which was allowed, and that on September 3d, just preceding, the plat of the survey was filed.

October 21, 1891, Sarah J. Hammel appeared for the purpose of making timber land entry under the act of Congress of June 3, 1878, for the same tract, which was refused for reason of conflict with the homestead entry of Charles Salzman. On the same day she filed her corroborated contest affidavit, alleging that the land was totally unfit for agricultural purposes, was not properly subject to homestead entry, and should be entered under the timber and stone act of June 3, 1878, and further, that the homestead entryman sought no home for himself, but that the entry was speculative, and in the interest of Brower and Thompson.

Salzman having filed his application to make final proof before a hearing had been ordered on the contest of Hammel, she was notified that the proof would be offered on January 28, 1892, and that she would then be heard in contest of its acceptance.

On the day named, the parties appeared in person and by attorneys, with their witnesses, and the proof of Salzman being offered, the protestant proceeded to cross-examine his witnesses, and offered in rebuttal thereof her testimony and that of her witnesses, and the case was

continued from day to day, until the 19th of February, when the local officers rendered their joint opinion, wherein they held for dismissal the contest of Hammel, and adjudged that the claimant be allowed to complete his said proof and make payment for the land.

From this decision Sarah J. Hammel, the protestant, appealed, and on July 6, 1892, your office reversed the finding below, and held for cancellation the entry of Salzman.

August 26, 1892, Salzman appealed from said decision, alleging seven grounds of error, which substantially amount to stating that the decision was contrary to the law and the evidence.

The evidence is voluminous and conflicting. The case raises two questions, which may properly be reduced to one. The bona fides of the entryman, and the character of the land in controversy.

The evidence shows that Charles Salzman moved on the land now in dispute, on May 26, 1890, having first purchased the improvements thereon of one, Tompkins for \$500; that from that day up to the date of hearing before the local officers, he and his family had continued to live there, and that he had made some additions to the house he had purchased, and built a chicken-house, and had done some clearing and planting. In all, his improvements now on the land, are variously estimated at from six to seven hundred dollars.

The tract is situated at an elevation of about two thousand four hundred feet, and is well timbered, the timber being highly valuable, owing to the proximity of two saw-mills. The witnesses differ in reference to the character of the soil and its adaptability to agricultural purposes.

The act providing for the sale of timber and stone land was passed June 3, 1878 (20 Stat. 89). The first section, after describing what lands the act applies to, provides,—

That nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any *bona fide* settler, or lands containing gold, silver, cinnabar, copper, or coal, etc.

Section 2 is as follows:

That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district, a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by, or belong to the applicant.

The second section of this act should be construed together with the first, and in thus construing the act it appears that it was intended to protect bona fide settlers. It would be a strained and unwarrantable interpretation to place upon the term "uninhabited," contained in this section, that such land should not be purchased, if perchance some one lived thereon, however lacking in good faith such settlement might be. If

such construction were placed upon the act, it would follow that none of these lands could be entered under its evident intent, where any form of settlement existed, however fraudulent and illegal the residence might be. The question at issue is the good faith of the settler Salzman, and in this connection only, was evidence admissible as to the character of the land, and its usefulness for farming, as it would then become a factor in determining the *bona fides* of the settler. Even if the tract was chiefly valuable for timber, this would not, of itself, defeat the entry of Salzman. The evidence fails to show by the preponderance of the testimony, that the land was unfit for agriculture.

It was further alleged that the claimant had taken the land for speculative purposes, in behalf of Brower and Thompson. Upon this point, it appears that Salzman borrowed from that firm \$500 to pay off Tompkins, and it is further shown that the loan was secured by a duly executed and recorded mortgage upon his farm in Kansas. But in addition to this, it is in evidence that Thompson, of the firm of Brower and Thompson, paid one, Shelton \$100 to negotiate the matter with the settler Tompkins. This testimony is fatal to the claim of Salzman's good faith, for the reason that his theory of *bona fides* is based upon Thompson not being interested in the matter, further than the loan of the \$500, which the evidence shows to have been repaid, but this presents him as an interested party in the land, and sustains the allegation that this land was settled upon by Salzman in the interest of Brower and Thompson, as alleged in the contest affidavit of the protestant.

It thus follows that the decision appealed from was correct, and the same is hereby affirmed.

RAILROAD LANDS—SECTION 3, ACT OF SEPTEMBER 29, 1890.

JAMES C. DALY.

The right to purchase from the government forfeited railroad lands, accorded by section 3, act of September 29, 1890, to those "who may have settled said land with bona fide intent to secure title thereto by purchase from the State or corporation," can not be exercised by one who has not established his residence on such lands.

First Assistant Secretary Sims to the Commissioner of the General Land Office, November 3, 1893.

Under date of the 15th of May, 1891, the register of the land office at Vancouver, Washington, signed a notice, which was duly published according to law, stating that James C. Daly had filed in said office notice of his intention to make final proof in support of his application to purchase, under section three of the act of Congress, of September 29, 1890, (26 Stat., 496) the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of Sec. 35, T. 3 N., R. 14 E., W. M., on the 27th of June, 1891, before the county clerk of Klickitat county, Washington, at Goldendale.

Such proof was made at the time and place named in said notice, and filed in the local office on the 6th of July, 1891. On the 30th of January, 1892, the local officers rejected said proof, because Daly was not claiming under deed, written contract with, or license from the Northern Pacific Railroad Company, and there was no evidence that he had settled the lands claimed, and for the further reason that the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section was claimed by Laughlin O'Brien, under his commuted homestead entry of August 5, 1891.

Daly thereupon relinquished to the United States all claim to the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section, and appealed to your office from the decision of the local officers rejecting his proof for the balance of the tract. On March 25, 1892, your office affirmed the decision of the local officers, and a further appeal brings the case to the Department.

The land in question was within the limits of the withdrawal on general route of August 13, 1870, for the Northern Pacific Railroad Company, but was forfeited to the United States by the act of September 29, 1890, entitled "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes." (26 Stat., 496.) Among other things, the third section of said act provides:

That in all cases where persons being citizens of the United States, or who have declared their intention to become such, in accordance with the naturalization laws of the United States, are in possession of any of the lands affected by any such grant, and hereby resumed by and restored to the United States, under deed, written contract with, or license from, the State or corporation to which such grant was made, or its assignee, executed prior to January first, eighteen hundred and eighty-three, or where persons may have settled said lands with bona fide intent to secure title thereto by purchase from the State or corporation when earned by compliance with the conditions or requirements of the granting acts of Congress, they shall be entitled to purchase the same from the United States, in quantities not exceeding three hundred and twenty acres to any one such person, at the rate of one dollar and twenty-five cents per acre, at any time within two years from the passage of this act, and on making said payment to receive patents therefor.

The proof presented by Daly showed that he had fenced the whole of the two hundred and eighty acres now claimed by him, together with a part of the forty which he relinquished. That said fencing was done in May, 1882, and since that time he had been in exclusive, undisturbed and peaceable possession of said land. That he had put in about a quarter of a mile of water pipe, and had used all the land for grazing purposes, none of it being fit for cultivation. From his proof, I give three printed questions, and his answers, as follows:

Q. When did you first settle said above described lands?

A. In May, 1882.

Q. What was your first act of settlement?

A. Fencing.

Q. What was your intention when you settled this tract of land?

A. To purchase it from the Northern Pacific Railroad Company, when it should come into market.

The proof also showed that Daly was a single person and resided on land adjoining, and very near this, and that he had never made a filing under section three of the act of September 29, 1890, for any other land.

Daly does not claim to have been in possession of this land under deed, written contract with, or license from the Northern Pacific Railroad Company, or its assignees, executed prior to January first, eighteen hundred and eighty-eight, but he does claim to have "settled said lands with bona fide intent to secure title thereto by purchase from said corporation when earned by compliance with the conditions or requirements of the granting acts of Congress," and that he is therefore entitled to purchase the same from the United States at the rate of one dollar and twenty-five cents per acre.

The forfeiture act of 1890, makes specific provision for the protection of three classes of claimants for lands released from the operation of railroad grants by said act, as follows:

1. Section two confers a preference right upon all "persons who at the date of the passage of this act are actual settlers in good faith on any of the lands hereby forfeited, and are otherwise qualified," to perfect title under the homestead law.

2. Section three confers upon persons "in possession of any of the lands affected by any such grant and hereby resumed by and restored to the United States, under deed, written contract with, or license from, the State or corporation to which such grant was made, or its assignees, executed prior to January 1, 1888," the right to purchase from the government three hundred and twenty acres of the land so held in possession.

3. Section three, also confers a similar right of purchase upon persons who "may have settled said land with bona fide intent to secure title thereto by purchase from the State or corporation when earned by compliance with the conditions or requirements of the granting acts of Congress."

It is under the latter provision of section three that Daly claims the right of purchase, and the question to be determined is whether, in the absence of any residence on the land, he is qualified to make such purchase.

The settler specified in section two is clearly distinguished from the one named in section three, and the distinction is found in the intent with which the settlement was made. The "actual settler in good faith," designated in section two, is one who goes upon land with the intention of making his home thereon and securing title thereto by compliance with the laws regulating the disposition of public land, and in accordance with such intent does establish a residence on such land, and make his home there to the exclusion of one elsewhere. But the settlement protected by section three, is one made with the "bona fide intent to secure title to the land by purchase from the State or corporation when earned," etc. The provisions of the two sections, however,

are alike in this, that both recognize an equitable claim on the part of the settler, and there would seem to be no reason why Congress should impose stricter conditions upon one class than upon the other. But to hold that no residence is required by section three on the part of one who "may have settled said lands," is to relieve him of a requirement that is imposed upon all "actual settlers" under the uniform departmental construction of that phrase. In both cases then, it is evident that Congress intended to give the settler an opportunity to secure the title to his home. If there was any doubt as to the intent of the statute in this particular, that doubt is removed by the amendatory act of June 25, 1892 (27 Stat., 59), which provides "that section three of an act entitled "an act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," be and the same is hereby amended so as to extend the time within which persons *actually residing* upon lands forfeited by said act shall be permitted to purchase the same in the quantities and upon the terms provided in said section at any time within three years from the passage of said act." This amendment can only apply to the persons specified in said section three, as those who "may have settled said lands," and, as descriptive thereof, designates them as "persons *actually residing*," and by such designation leaves no room now for construction of the language employed in the original act.

Your office decision is therefore affirmed.

PRE-EMPTION—SETTLEMENT—DECLARATORY STATEMENT.

CULVER v. McMILLAN.

Settlement upon the public land is a personal act, and can not be made by an agent. A pre-emption declaratory statement filed without the pre-requisite settlement affords the claimant no protection; but the defective claim is cured by subsequent settlement in the absence of any intervening adverse right.

First Assistant Secretary Sims to the Commissioner of the General Land Office, November 3, 1893.

On the 15th of March, 1889, Hugh J. McMillan made pre-emption declaratory statement for the SW. $\frac{1}{4}$ of Sec. 32, T. 29 N., R. 43 E., Spokane Falls land district, Washington, alleging settlement on the 8th of that month.

On the 23d of October, 1889, George E. Culver made declaratory statement for the same tract, but the date of his alleged settlement does not appear, except that he commenced building a house on the land in that month.

McMillan submitted final proof on the 19th of March, 1890, in pursuance of published notice. Of his intention to submit such proof, no special notice was given to Culver, and on the 26th of March, 1890, he

filed a protest against the sufficiency and acceptance of such proof, and asked for a hearing, at which he could cross-examine McMillan and his witnesses, and submit proof in support of the charges contained in his protest.

Such hearing was had, at which the fact was disclosed that McMillan did not see, or personally go upon the land, prior to his filing, and not until July, 1889, when he erected a house thereon. The acts of settlement performed on the 8th of March, of that year, were cutting down trees, and placing in the form of a foundation for a house, four logs. This was done by a brother-in-law of McMillan, at the latter's request.

Upon this showing, the local officers rejected his final proof, holding that "settlement must precede filing in all cases," and that erecting a house upon the land in July, did not remedy this defect. A rehearing was asked for, which was refused by the local officers. Upon appeal, the decision of the local officers was reversed by your office on April 14, 1892, and a further appeal brings the case to the Department.

In his testimony given at the hearing, Culver stated that he first saw the land in question, some time in June, 1889; that the improvements then upon it were four logs in the form of a foundation for a house; that he was next upon the land about the 20th of October, when he saw the house of McMillan, which was not then occupied. To the question "At the time you filed your pre-emption for that land, did you know that Mr. McMillan had a pre-emption filing covering the same tract of land?" he answered, "I did". He added that he was told that about the time he was first upon the land.

The fact that McMillan did not sooner establish his residence upon the land, with his family, is explained by showing serious illness on the part of himself and two of his children, one of whom died in August. As soon thereafter as he was able, he moved his family upon the tract, and has since resided there continuously.

The Department has uniformly held that the act of settlement upon the public lands must be personal, and can not be made by an agent. It is clear, therefore, that the act of settlement alleged by McMillan as having been made on the 8th of March, 1889, was not sufficient to meet the requirements of the law.

In the case of Charles C. Martin (3 L. D., 373), it was held that failure to settle before filing a pre-emption declaratory statement, is cured by settlement prior to the intervention of an adverse right. This doctrine was repeated in *Hunt v. Lavin* (3 L. D., 499), and in *Gray v. Nye* (6 L. D., 232), it was said, "though the settlement alleged as the basis of the filing, may be insufficient, if the pre-emptor, after filing, and before the intervention of an adverse right, settles in good faith on the land, the defect in his claim is cured thereby."

In the general circular, issued by the Land Department in February, 1892, the question was disposed of in a paragraph on page 190, in the following language:

A filing without actual settlement is illegal, and no rights are acquired thereby, although a subsequent bona fide settlement may be recognized, if made before the intervention of a valid adverse claim, and duly followed up by the proper inhabitancy and improvements.

The affidavit required of a pre-emptor did not provide for any statement as to prior settlement, but that he should make oath that he had never had the benefit of any right of pre-emption, and took the tract in good faith, to appropriate it to his own exclusive use and benefit, etc.

The facts and circumstances of this case show that McMillan did not make settlement upon the land in question prior to his filing therefor, but that he did settle thereon in July, 1889, which was before the intervention of any adverse right on the part of Culver. McMillan's act of settlement in July—the building of his house—was followed by the actual residence of himself and family upon the land, within a reasonable time thereafter, and as soon as the health of himself and his children would permit.

It is also shown that Culver was aware of McMillan's filing for the land, and of his building a house thereon, before he took any action towards securing title thereto. What he did, therefore, was with full knowledge of the claim of McMillan, and he must abide by the consequences of his proceeding.

I am convinced of the good faith of McMillan in his efforts to secure title to the land, and his poor health was a matter which he could not control. My conclusion is, that the decision appealed from is correct, and it is hereby affirmed.

CONTEST—QUALIFICATIONS OF THE CONTESTANT.

SPITZ *v.* RODEY.

The validity of a contest is not affected by the fact that the contestant is an alien.

First Assistant Secretary Sims to the Commissioner of the General Land Office, November 3, 1893.

The timber culture entry of Bernard S. Rodey, embracing the SE. $\frac{1}{4}$ of Sec. 34, T. 10 N., R. 3 E., within the land district of Santa Fe, New Mexico, of date January 25, 1884, is attacked by Edward Spitz, in his affidavit of contest filed November 25, 1890. The allegations of the affidavit pursue the tenor customary in such cases.

After numerous continuances, testimony was finally taken before a notary in Albuquerque. Both parties appeared, but the defendant offered no testimony, preferring, as it would seem, to stand upon an exception, by way of demurrer, to the testimony of the contestant, on the ground that the latter, being an alien, was incompetent to make a contest.

The evidence establishes to my satisfaction that the claimant has not complied with the law, nor scarcely made a pretense of doing so,

and the only question left to be determined, therefore, is as to the competency of an alien to initiate a contest for the cancellation of an entry.

In the case of *Lerne v. Martin*, reported in 5 L. D., 259, where the same question was considered and decided, it is said that "it has been repeatedly ruled by this Department that any person can contest a homestead entry." The authority of this case, however, is repudiated by contestee "as ill-considered and inadvertently rendered," and this Department is "respectfully requested to settle for all time an important question like this."

Since I can not agree with the contestee that the case of *Lerne v. Martin* was either ill-considered or inadvertently rendered, but, on the contrary, fully concur in the conclusion there reached, and elsewhere held, that the government has no interest whatever in the personality of the individual who initiates a contest, I had come to regard the question as *stare decisis*, and therefore no longer open to discussion.

This Department has held, not *ipsissimis verbis*, but in effect, that anybody competent to make an affidavit may set on foot a contest. To be sure, in order to encourage meritorious contests and circumvent fraud upon the government and spoliation of the public domain, certain preference rights have been conferred upon successful contestants, but these rights are subject to the legal disability of the parties. A minor may prosecute a contest, but he is disabled by law to exercise the preference right of entry conferred by the statute. "Under the rulings of the Department the government is a party to every contest, and can, if it chooses, act upon the record and cancel the entry regardless of contestant's qualifications." (16 L. D., 403). The contestant in that case was a minor. The status of the alien, *quoad hoc* does not differ from that of the minor.

I see no error in the decision of your office, and it is therefore affirmed.

TIMBER CULTURE CONTEST—AGENT—ATTORNEY.

SCHMIDT *v.* KEIRNAN.

An agent employed to care for a timber culture entry may properly secure counsel to appear on behalf of the entryman in the event of a contest against the entry. A charge of non-compliance with the timber culture law should be established by a preponderance of the evidence to warrant cancellation.

First Assistant Secretary Sims to the Commissioner of the General Land Office, November 3, 1893.

On April 21, 1886, James Keirnan made timber culture entry No. 5152, of the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 30, T. 4 S., R. 65 W., Denver, Colorado, land district. Three years thereafter, to wit, on April 25, 1889, Frederick Schmidt filed his affidavit of

contest, alleging failure to comply with the law with respect to breaking, cultivation, and planting.

At the hearing before the local officers it was developed that Louis Dugal, who appeared for the defendant, was acting in pursuance of employment by Joseph Leonard, who claimed to be the agent of the entryman, Keirnan. The fact of agency being brought in question by the contestant, Leonard gave testimony of his verbal employment by Keirnan upon the eve of his departure from the State of Colorado, some two years anterior to the institution of these proceedings. It appears from the testimony of Leonard that Keirnan sold out all his interests in Colorado except the timber claim, which he left in the charge of the former, with instructions to take care of it, or look after it.

While it is true that Leonard's testimony supplies a slender thread upon which to hang an agency, there is nothing in the record to discredit the witness himself, or to disprove his statements made under oath. It must, therefore, be taken as true that upon leaving the State the claimant requested and authorized the witness to look after and take care of his entry, and that the employment was accepted. This employment carried with it the authority, and imposed the duty, to do anything and everything necessary for the protection of defendant's interests in that behalf. It would have been futile to expend time and labor in developing the claim within the requirements of the law, and then to abandon it upon the first disclosure of an adverse interest, or demand. To defend this contest, then, was clearly within the scope of his authority, and to have permitted it to go by default would have been an abandonment of duty.

On the merits of the case, after a careful and painstaking examination of the testimony, I find myself unable to concur in the conclusions of your office decision.

The five witnesses for the defense, Connel, Thompson, Mrs. Casne and the two Leonards, father and son, all familiar with the claim, and professing positive knowledge as to the work done thereon, appear to me to have testified, if not always with accuracy, certainly from conviction. With respects to dates, their testimony was from memory, and it would have been astonishing if there had been an entire absence of disagreement and confusion. The absence of these, under the circumstances of the case, would rather have afforded ground of suspicion of pre-arrangement as to those details. As to the main facts of seasonable and sufficient plowing, cultivation and planting, the preponderance of the evidence, to say the least of it, is with the defendant.

It is shown, to be sure, that a growth of trees had not been secured, but it is to be borne in mind that this contest was initiated just at the close of the third year of entry. The planting of that year, shown to have been duly made, had not had time for development.

The register and receiver heard the witnesses testify and observed

their manner, and their recommendations, in which I concur, should, in a case like this, command great consideration.

The decision of your office is therefore reversed, the contest is dismissed, and the entry will stand.

HOMESTEAD ENTRY—ALIEN—EQUITABLE ACTION.

ADOLPH BLANK.

A homestead entry made by an alien can not be confirmed under rule 32, of the rules of equitable adjudication, for the benefit of the heirs, where the entryman dies without having complied with the naturalization laws, or declared his intention to become a citizen.

First Assistant Secretary Sims to the Commissioner of the General Land Office, November 3, 1893.

I have considered the appeal of Adolph Blank, heir and devisee of Robert Blank, deceased, from your decision of August 31, 1892, rejecting his final proof and holding for cancellation homestead entry No. 4203, made by said Robert Blank March 1, 1886, and embracing the SE. $\frac{1}{4}$ of Sec. 11, T. 24 S., R. 17 E., M. D. M., in the Visalia, California, land district.

Briefly stated, the facts are that Robert Blank, of foreign birth, made said entry at the time stated, established residence on the land, built a house ten by fourteen feet, cultivated sixty acres of land, lived there continuously until November 12, 1886, when he died, leaving no evidence that he had ever complied with the requirements of the naturalization laws, or declared his intention to become a citizen of the United States.

Adolph Blank, brother, heir at law and devisee of Robert, and a naturalized citizen, continued the cultivation and improvement of said tract from his brother's death, up to the date of final proof, in absolute good faith and as required by law.

The ground upon which a right to patent is urged is that the facts stated bring this case within the provisions of rule 32 of April 24, 1890 (10 L. D., 503). That rule is as follows—

All homestead and timber culture entries in which the party has shown good faith and a substantial compliance with the legal requirements of residence and cultivation of the land in homestead entries, or the required planting, cultivating, and protecting of the timber, in timber culture entries, but in which the party did not, through ignorance of the law, declare his intention to become a citizen of the United States until after he had made his entry, or, in homestead entries, did not from like cause perfect citizenship until after the making of final proof, and in which there is no adverse claim.

Under that rule, Robert Blank, had he lived, could have filed his declaration of intention to become a citizen between the date of entry and final proof, or even after final proof, in the absence of an adverse

claim, and by so doing have saved his entry. But the privilege granted the entryman under that rule is a personal one purely, and cannot be exercised by any one save the entryman himself. It is not a right established by law that descends from ancestor to heir, or that can be bequeathed or devised, but a personal privilege established by a regulation of this Department in the interest of equity.

The entry in question was illegal at its inception, because made by one who was not a qualified entryman, and the only way in which vitality could have been infused into it was by the entryman taking advantage of the privilege afforded by said rule 32. That was not done in this instance, and as Adolph, the heir and devisee of Robert Blank, cannot cure the laches of Robert in that respect, because of the reasons above stated, the entry cannot stand.

The discussion of this question has been extended beyond a formal affirmance of your said office decision, because of the urgent insistence of the appellant's attorney of his client's rights under said rule.

The decision of your office is affirmed.

RAILROAD GRANT—WITHDRAWAL—SETTLEMENT RIGHT.

NORTHERN PACIFIC R. R. CO. *v.* McMAHAN.

A withdrawal on an amended map of general route is no bar to the subsequent acquisition of settlement rights.

A corroborated allegation of settlement and residence antedating an indemnity withdrawal may be accepted as conclusive as against the withdrawal, in the absence of a showing on the part of the company, furnished within a specified time, that the settlement and residence were not made as alleged.

Secretary Smith to the Commissioner of the General Land Office, November 4, 1893.

I have considered the motion filed by the Northern Pacific Railroad Company for the review of departmental decision of November 19, 1888, in the case of said company against Richard McMahan, involving the SE. $\frac{1}{4}$, Sec. 15, T. 15 N., R. 44 E., W. M., Spokane Falls land district, Washington, which reversed the action of your office in denying McMahan's application, for conflict with the withdrawal made on account of the grant for said company.

This land is within the limits of the withdrawal upon the line of amended general route of said road, the map showing which was filed February 21, 1872, and upon the definite location of the road, it fell within the indemnity limits, the order for the withdrawal on account of which was made by your office letter of December 2, 1880.

On April 14, 1883, the local officers rejected McMahan's application for this land, and your office decision of December 8, 1883, states that when he offered his said application he filed his own affidavit, corrobora-

rated by two witnesses, to the effect that he settled upon the land on April 1, 1873, and has continuously resided thereon since April 1, 1874, having improved the land to the value of \$1,000.

It will be seen that at the date of McMahan's alleged settlement, the only bar thereto was the withdrawal upon the map of amended general route, which, in the case of *Cole v. Northern Pacific Railroad Company* (17 L. D., 8), was held to have been made without authority of law, and was consequently no bar to his settlement. His settlement and residence antedated the withdrawal for indemnity purposes, so that for the present case it is unnecessary to determine the effect of such indemnity withdrawal.

Upon inquiry at your office, I learn that the company selected this land in its list of March 20, 1884. Such subsequent selection can in no wise affect the rights of McMahan. If his allegation of settlement and residence is not denied by the company, I can see no good reason to require him to go to the expense incident upon a hearing to sustain the same.

I have therefore to direct that the company be advised of the allegations by McMahan of settlement and residence, antedating its indemnity withdrawal, and, in the event that it fails to file affidavits tending to show that such settlement and residence were not made as alleged, within thirty days from notice, that his application be allowed and its selection be canceled.

Should such affidavits be filed, a hearing will be proceeded with as in other cases made and provided.

To this extent the previous decision is modified.

PROCEEDINGS BY THE GOVERNMENT—CONTINUANCE.

UNITED STATES *v.* TAYLOR ET AL.

A hearing ordered on the report of a special agent may be properly continued in the interest of the government where the special agent can not be present at the trial, and the allowance of two or more continuances for such reason is not an abuse of discretion provided due notice is given in advance of such action.

First Assistant Secretary Sims to the Commissioner of the General Land Office, November 3, 1893.

On November 12, 1887, Moses W. Taylor made desert land entry No. 713, for the E. $\frac{1}{2}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 15, and Lots 1, 2, 3, and 4, Sec. 14, T. 13 S., R. 46 E., Blackfoot land district, Idaho.

On the same day John W. Taylor made desert land entry, No. 714, for the S. $\frac{1}{2}$, the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of Sec. 22, same township and range, and, on November 17, 1887, Hyrum W. Taylor made desert land entry No. 715 for the N. $\frac{1}{2}$ and the

SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 27, same township and range.

Moses W. and John W. Taylor made final proof on their entries November 11, 1890, and Hyrum W. Taylor made final proof the day following (November 12). Final certificates were duly issued.

All these entries were held for cancellation, on the report of Agent Wall showing gross frauds.

Upon applications made by the entrymen, hearing was granted by your office letters ("P") of March 25, and April 16, 1891, to show cause why said entries should stand, and August 16, 1891, was the day set for the hearing, and Agent Wall and all parties in interest were notified. The government not being ready to proceed on that day, a continuance was granted until October 1.

On September 12, 1891, nineteen days before the second date fixed for the hearing, Agent Wall again requested a postponement of the hearing for sixty days (to December 1, 1891), "as I will not be able to attend." This second continuance was also granted.

On November 30, 1891, Agent Wall sent a telegram from Portland, Oregon, to the local officers at Blackfoot, advising them that "Commissioner orders Taylor cases continued for thirty days." It would appear that the case was again continued on that telegram. On December 29, 1891, the agent sent another telegram from Boise City, Idaho, saying: "Postpone Taylor cases for twenty days from first of January next; am officially detained at court in Boise."

On January 2, 1892, the register and receiver dismissed the several cases, apparently sustaining the grounds set up in the motion therefor—namely: that the government had already had three continuances without assigning any reason therefor, thus putting the defendants to great expense and inconvenience, and that the government should be governed by the same rules of practice that apply to individual contests, and was entitled to but one continuance.

By your office letter ("P") of May 18, 1892, the action of the register and receiver was reversed, and those officers were advised that a special agent would be detailed at an early day to confer with them and arrange for a hearing. An appeal from that judgment brings the case to this Department.

The rule is well settled that an appeal will not lie from a decision of your office ordering a hearing. (See Practice Rule 81; *James H. Murray*, 6 L. D., 124; *Samuel J. Bogart*, 9 L. D., 217; *Reeve v. Emblem*, 8 L. D., 444; *Bailey v. Olson*, 2 L. D., 40.)

It is insisted, however, that a succession of defaults on the part of the government warrants a dismissal of the cases; that the fact that the special agent was detained elsewhere was not a sufficient reason for unlimited continuances; that the decision appealed from is against "all law and equity."

When an entry is held for cancellation on the report of a special

agent, the claimant is entitled to notice of such action, and, under the circular of July 31, 1885 (5 L. D., 503), as amended by circular of May 24, 1886 (*idem.*, 545), he is allowed sixty days, after due notice, "in which to apply for a hearing to show cause why the entry should be sustained." If, at the expiration of such time, the claimant fails to apply for a hearing to show cause, etc., the entry should then be canceled. But, if a hearing is ordered on the application of a claimant, the government should offer proof to sustain the allegation that the entry is fraudulent or illegal, before the entryman shall be required to present his defense, such proceeding being *de novo* at which the ex-parte testimony contained in the agent's report should not be considered, the burden of proof being upon the government, and cross-examination of its witnesses allowed. Henry C. Putnam, 5 L. D., 22; John A. McKay, 8 L. D., 526.

Practice Rule 20, relating to continuances, provides that "where hearings are ordered by the Commissioner of the General Land Office, in cases to which the United States is a party, continuances will be granted in accordance with the usual practice in United States cases in the courts, without requiring an affidavit on the part of the government."

The government has the right to direct the postponement or continuance of a case before the local officers to enable it to investigate the case, and there is no abuse of discretion in so doing. A. C. Logan *et al.*, 8 L. D., 2.

When a hearing is ordered by the government on the report of a special agent, it is the practice to have its interests represented by an agent, and where the exigencies of the public service are such that it is impossible or impracticable for the agent to be present at the hearing on the day previously fixed, a continuance should be granted, the burden being upon the government to establish its charges. And the fact that even two or more continuances are granted is not an abuse of discretion, provided your office or the agent causes due notice in advance to be given to the entryman that he may avoid the necessary expense incident to the hearing. It would be manifestly unjust, however, for such agent to arbitrarily, and without previous notice, postpone a hearing without sufficient reason therefor, thus putting the claimant to unnecessary expense in securing the attendance of his witnesses, and such practice should not be tolerated.

The request for postponement in these cases, made November 30, 1891, and December 29, following, did not give sufficient time for a notification thereof to be made to the claimants, and, as a result, they were subjected to the unnecessary expense of twice attending the hearing, with their witnesses, at an alleged distance of one hundred and fifty miles. This was wrong, if it could, by any possibility, have been avoided.

In the absence of any showing to the contrary, however, it is presumed that the agent, who investigated these cases, gave notice at as

early a date as was possible, not being able to anticipate his enforced detention in the district court at Boise. Though necessarily entailing extra expense upon claimants, it is not apparent that it could have been avoided.

The report of Agent Wall, on which the entries were held for cancellation, discloses gross frauds and perjury in the final proof in each of these cases, and a hearing should be had upon the charges. If the claimants made honest statements in their final proof, they ought to be anxious, rather than chary, to support these statements.

For the reasons above given, the decision appealed from is affirmed, and the papers are herewith returned.

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PRACTICE—PETITION FOR RE-REVIEW.

JAMES C. McLAUGHLIN.

A petition for re-review that does not suggest new facts or law not theretofore discussed will be sent to the files without further action.

Secretary Smith to the Commissioner of the General Land Office, November 3, 1893.

By your office letter ("E") of May 27, 1893, there is transmitted a petition for re-review, filed in your office May 13, 1893, of departmental decision of March 27, 1891 (12 L. D., 304).

A motion for review of this decision was overruled June 24, 1891 (12 L. D., 681), and the motion for re-review asks that the original decision be "overruled and set aside for many errors apparent on its face, and which appear in the body of said decision." Counsel then proceed to argue the identical points decided in the motion for review.

In the case of *Neff v. Cowhick* (8 L. D., 111), the question of motions for re-review was discussed, and it was decided that such motions should not be allowed, but, "if the defeated party is able to present any suggestions of fact or points of law not previously discussed or involved in the case, it may be done by petition," but "such petition should not re-argue points already twice passed upon, but should be limited to the office indicated of suggesting new facts or considerations not before presented."

The petition in this case is subject to the objections pointed out in the *Cowhick* case, and is therefore denied.

The recent rule promulgated as an amendment to rule 114, Rules of Practice (17 L. D., 194), provides that:

Motions for a re-review, or a second reconsideration of a decision, shall not be received or filed. But the defeated party, if able, may invite the attention of the Secretary, by a duly verified petition, to important matters of fact or law not theretofore discussed or involved in the case; who, upon consideration thereof, will either recall the case, or send the petition to the files without further action.

In accordance with this rule, the petition is returned to your files without further action.

SOLDIERS' ADDITIONAL HOMESTEAD—MILLE LAC LANDS.

GEORGE A. MORRIS.

An application to make a soldier's additional homestead entry of Mille Lac Indian lands, under a power of attorney that is in effect an attempted transfer of the soldiers additional right, and is properly rejected for "reasons sufficient in law" when presented at the local office, is not within the provisions of the departmental order of March 10, 1877; nor does the subsequent allowance of such an application bring the entry within the protection accorded valid homestead entries by the act of January 14, 1889, opening said lands for disposal under the homestead laws.

A soldiers additional entry made under such a power of attorney and then canceled, can not be lawfully reinstated, where the soldier after the cancellation of such entry revokes the power of attorney and makes an additional entry in his own right and secures patent thereon.

A purchaser of the land covered by a soldier's additional entry made under a power of attorney that is in effect a transfer of the soldier's additional right, prior to the exercise thereof, is not entitled to purchase such land from the government under section 2, act of June 15, 1880, nor to confirmation of the entry under section 7, act of March 3, 1891.

An entry reinstated for the purpose of examining into its *bona fide* character, and so remaining for the period of two years is not confirmed by the proviso to section 7, act of March 3, 1891.

The right to purchase land covered by a soldier's additional entry conferred by the act of March 3, 1893, extends only to entries made or initiated upon a certificate of additional right.

First Assistant Secretary Sims to the Commissioner of the General Land Office, November 8, 1893.

I have considered the appeal of the Mississippi Logging Company from your office decision of June 26, 1891, in the above entitled matter, transmitted to this Department by your letter "C" of September 30, 1891.

The questions involved were presented to your office for consideration by filing therein the application of D. M. Sabin, dated April 2, 1883, and the application of A. H. Wilder, dated March 14, 1889, to purchase the tract in controversy hereinafter described, under act of June 15, 1880.

The facts upon which said alleged right to purchase is based, are as follows—

September 26, 1865, George A. Morris made homestead entry No. 1387 of the W. $\frac{1}{2}$ of lot one (1) in the NW. $\frac{1}{4}$ of Sec. one (1), T. 26 N., R. 25 W., containing forty acres, at Boonville, land district, Missouri.

January 6, 1871, he made final proof at Springfield, Missouri, receiving final certificate No. 192, upon which patent issued August 25, 1871.

It appears from the record that Morris served in the Federal army from August 3, 1862, to September 4, 1865, as a member of Co. "G," 1st Regiment, Arkansas Cavalry, and hence, under the provisions of Sec. 2306, of the Revised Statutes of the United States, he was entitled to an additional homestead entry of one hundred and twenty acres.

April 2, 1875, Morris, then of Lawrence county, Missouri, his wife joining with him, executed to one Thomas B. Walker, of Hennepin county, Minnesota, an instrument in writing, purporting to be a power of attorney, which instrument was duly acknowledged, attested and sealed, before a duly authorized officer, and contained a relinquishment of the wife's right of dower in said real estate, and among other provisions contained the following—

To enter upon, and take possession of any and all pieces and parcels of land, . . . in which we may now or hereafter be in any way interested under the provisions of the soldier's and sailor's homestead laws, approved June 8, 1872, as amended by the act approved March 3, 1873, under which laws I am entitled to enter one hundred and twenty acres of land in addition to my forty acres homestead, and we further authorize our said attorney to grant bargain, sell, demise, lease, convey, and confirm said land, or any part thereof, or any right to sever and remove timber and materials therefrom, to such person or persons, and for such prices as to our said attorney shall seem meet and proper, and thereupon to execute, acknowledge, and deliver in our name and on our behalf any deeds, leases, contract., or other instruments, sealed, or unsealed, and with or without covenants and warranty, as to him shall seem meet to carry out the foregoing powers . . . And in consideration of the sum of one hundred and fifty dollars to us in hand paid by our said attorney at the ensembling hereof, the receipt whereof we do hereby acknowledge, we do further appoint, and ordain that our said attorney is irrevocably vested with the power above granted, and we do hereby forever renounce all right in us to revoke any of said powers, or to appoint any person other than our said attorney to execute the same, and forever renounce all right on our own part personally to do any of the acts our said attorney is hereby authorized to perform, and do hereby release unto our said attorney all our claim to any of the proceeds of any sale, lease, or contract relative to said land, or timber or materials thereon.

June 17, 1875, the said Walker made application at the local land office at Taylors Falls, Minnesota, to enter, in the name of Morris, as his attorney in fact, and as additional to his original homestead entry, lots 5 and 6, Sec. 18, T. 42 N., R. 26 W., containing 125.09 acres.

This application, with a number of others presented at the same time, was rejected, under instructions from your office to allow no entries in said township, it being within the Millé Lac Indian reservation, until the rights of the Indians thereto should be determined.

From the rejection of said application said attorney in fact appealed, and said appeal was transmitted to your office by the local officers June 19, 1875.

From the notations on this case in your office, it appears that the answer to said appeal, dated August 9, 1875, was not returned, and was "supposed lost in "C. Clerk's room," and no other or further action was taken on said appeal by your office.

August 13, 1877, Morris executed in Lawrence county, Missouri, before a notary public, an affidavit, which, among other things, contained the following statements—

That it seems from the best representation he can obtain that his right to an additional entry under said act has been transferred, and probably located by an attorney acting for him, without any authority from him, the said Morris. He further

swears that he has made no assignment of said right before any notary public, justice of the peace, or other officer authorized to take acknowledgements, but signed some blanks, without witnessing, or officer's certificate, and that he has not received for any money or other property in payment for the same, but was paid \$20 only, and that he hereby demands the cancel of any entry that may have been made in his name.

This affidavit, accompanied by an application for a certificate of right to make additional homestead entry, was forwarded to your office by Morris, who, believing that Walker had, under said power of attorney, made entry, demanded the cancellation of said entry.

June 1, 1878, your office issued to Morris a certificate of right.

March 12, 1879, the local officers at Taylors Falls allowed said attorney in fact to make, in the name of Morris, the additional homestead entry No. 1477, rejected by them June 17, 1875.

May 19, 1879, this Department, by letter of that date, directed the cancellation of said entry, with others made at the same time, which was done by letter of your office of May 21, 1879.

February 18, 1881, Morris located his certificate of right and made homestead entry No. 1746 at Humboldt, California, embracing the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 15, the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 22, and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 23, all in T. 4 S., R. 4 E., 120 acres; upon this entry final certificate No. 427 was issued, and patent issued thereon January 23, 1883.

August 7, 1882, this Department, on application, directed that the homestead entry made by said attorney in fact at Taylors Falls, with others made at the same time, be re-instated for an examination of their *bona fide* character, and August 15, 1882, that was done, by your office letter of that date.

April 12, 1883, there was transmitted to your office a copy of the power of attorney executed by Morris and wife to Walker, accompanied by an affidavit of one D. M. Sabin, in which he states that prior to June 15, 1880, he purchased from Walker the land included in the Taylors Falls homestead entry No. 1477, made in Morris' name, and asks to be allowed to purchase said land and perfect his title thereto under the act of June 15, 1880, and on March 14, 1889, a similar application of A. H. Wilder was transmitted to your office. Your office decision of June 26, 1891, denied the request to purchase under the act of June 15, 1880, and held that the Taylors Falls "entry being certainly illegal and possibly fraudulent, is not subject to purchase under said act," citing 6 L. D., 457; 7 L. D., 94; same, 301; 8 L. D., 55; 9 L. D., 195; and that section 7, act of March 3, 1891, has no reference to entries void *ab initio*, and held said entry for cancellation.

From said decision the Mississippi Logging Company appeals, claiming it purchased the tract in question April 1, 1889, in good faith, and for value.

The errors specified are ten in number, but without considering them *seriatim*, I come to what I deem the controlling questions in the case.

As stated, this tract was a part of the Mille Lac Indian reservation, established by treaty of February 22, 1855 (10 Stat., 1165), and after various acts of Congress and decisions, and rulings of this Department with reference thereto, the agricultural lands on said reservation were, by the provisions of Sec. 6 of the act of January 14, 1889 (25 Stat., 642), thrown open for disposal to "actual settlers" only, under the provisions of the homestead law, with the proviso,

that nothing in this act shall be held to authorize the sale or other disposal under its provisions of any tract upon which there is a subsisting valid preëmption or homestead entry, but such entry shall be proceeded with under the regulations and decisions in force at the date of its allowance, and if found regular and valid, patents shall issue thereon.

Was the Taylors Falls entry a subsisting valid homestead entry within the meaning of the act of January 14, *supra*?

The alleged power of attorney executed by Morris and wife to Walker was an absolute sale of the soldier's additional right. This has been held by the Department to be a "personal right, unassignable, which can only be exercised by the soldier," (10 L. D., 354; 7 L. D., 565) and by the authority first referred to, it is declared that such has been the departmental construction of the statute, conferring that right, ever since the date of its enactment, citing the circulars and decisions to that effect. The principle uniformly upheld by this Department is "that the law forbids and will not recognize the assignment of a soldier's additional homestead right" (8 L. D., 608). And it is held "that it is the duty of the Department to cancel any entry made contrary to law" (8 L. D., 269).

It is contended that at the date of the execution of said so called power of attorney and the application to make homestead entry thereunder, application by the authorized agent or attorney of the entryman was permissible, under the circular of August 5, 1874. That by the Secretary's instructions of July 10, 1876 (7 L. D., 566), modifying his order of May 17, 1876, abolishing said practice, he directed "that all applications pending, on May 17, 1876, which have been made by a duly qualified person in accordance with the regulations of the Department, then in force, should be allowed." That the further modification of said order of May 17, 1876, of date March 10, 1877, directs that the following class of soldier's additional homestead entries may be allowed—

1. Those presented prior to order of March 20, 1876, and rejected for reasons insufficient in law to bar their reception, but kept alive by appeal which by such rejection were postponed beyond the date of the order and so lost. (7 L. D., 567.)

It is urged that the instructions of July 10, 1876, and of March 10, 1877, *supra*, save the entry in question, and render it *bona fide*; that the application therefore was made "prior to May 17, 1876, by a duly qualified person, under the instructions then in force;" that said application "was presented prior to March 20, 1876, was rejected for insuf-

ficient reasons, and was kept alive by appeal," etc. This position is not a tenable one. The circular of May 17, 1876, *supra*, required the presence of the soldier at the local office when making an additional entry. It was promulgated for the purpose of putting an end to frauds perpetrated on the government by means of such instruments of writing, as the pretended power of attorney executed by Morris and his wife in this case. It did put an end to them, but at the same time it imposed a hardship upon a large class of persons entitled to the additional homestead right, who for various reasons could not reach the local office; hence the modifying order of July 10, *supra*, which was intended to relieve this class referred to, by allowing them to make entry for their own benefit through a duly qualified agent or attorney, under the regulations then in force.

The entry in question was not a *bona fide* entry in this: It was not made for the benefit of the soldier. It was not made under a *bona fide* power of attorney, but under an instrument conveying the soldier's additional right to the alleged attorney in fact, which instrument, by the rulings of this Department, conveyed no right whatever, and it was not made under the rulings then in force, which required the filing of the affidavit by the soldier that the entry was made for his "own exclusive use and benefit, and for the use and benefit of no other person or persons whomsoever." Or, if such an affidavit was filed, it was a fraud on its face, and the rule established by this Department is that "under no circumstances will it permit itself knowingly to be made an instrument to further the fraudulent designs of an individual who is seeking to acquire title to land to which he has no right" (4 L. D., 159-160; *id.*, 308).

For the reasons above stated, said application was rejected for "reasons sufficient in law" when presented to the local officers at Taylors Falls, and hence does not fall within the provisions of the order of March 10, 1877, *supra*.

This entry was canceled by order of the Secretary May 21, 1879. August 7, 1882, it was re-instated for an examination of its *bona fide* character.

Between the date of the cancellation and the re-instatement of said entry, Morris, by his affidavit and application of August 13, 1877, attempted, in so far as he could, to revoke whatever authority said alleged power of attorney vested in Walker; and in said affidavit he calls attention to the fact that his right seems to have been transferred; that he had never assigned it; that he had only signed some blanks; this affidavit became a part of the records and files of your office, and was constructive notice to the world of the character of the Taylors Falls entry. He obtained and located his certificate of right at Humboldt, California, thereby exhausting said right. All this as stated was done after the cancellation and before the re-instatement of said entry, was of record in your office and was constructive notice to the world that

said right was exhausted. Hence said re-instatement was without any authority of law whatever.

The attorneys of Walker, and of Sabin and Wilder his grantees, must have known of the action in granting Morris' certificate of right, otherwise, the application to purchase under the act of June 15, 1880, would not have been filed, as no other action adverse to the Taylors Falls entry had been taken after its re-instatement.

Appellants contend further that the right of purchase under the act of June 15, 1880 (21 Stat., 237, Sec. 2), exists, or that failing, that said entry is confirmed by section 7 of the act of March 3, 1891, or the proviso thereto (26 Stat., 1095).

As stated in your said office decision, no instruments of title have been filed by either Sabin or Wilder in support of their respective affidavits alleging the purchase of this land prior to June 15, 1880.

Admitting that these affidavits are not sufficient to prove title or conveyance in an adversary proceeding, yet in an *ex parte* matter like this, they are *prima facie* evidence of the allegations therein contained, and in the absence of anything to the contrary, warrant the assumption that these facts exist, and that the best evidence of their existence would be forthcoming if required, and the consideration of the alleged right to purchase under the act of June 15, 1880, is based upon that assumption.

Sec. 2 of said act of June 15, 1880, provides as follows—

That persons who have heretofore under any of the homestead laws, entered any lands properly subject to entry, or persons to whom the right of those having so entered for homesteads, may have been attempted to be transferred by *bona fide* instruments in writing, may entitle themselves to said lands by paying the government price therefor, etc.

In the case of the Puget Mill Co. *v.* Brown, 54 Fed. Rep., 987, a case arising under the section above quoted, the circuit court say—

An attempt to convey a title can not be *bona fide* on the part of the vendee unless in making the purchase he acts with reasonable prudence, and under an honest belief that the vendor has the right to convey the title to him. Now I find annexed to the statement of facts the original instrument purporting to be a power of attorney from Susan King to W. D. Scott, under which the deed to plaintiff was executed by Scott. By the date of its execution and acknowledgement, in connection with the admitted fact that the complainant's bargain was for scrip (so called), and that it paid the purchase money to a stranger, and the further fact that upon the present trial the complainant has not offered to prove that the so called "scrip" which it bargained for was different in character from the sets of blanks which were commonly sold and traded in by dealers, and by them called "Soldier's Additional Homestead Scrip," the inference is justified, that the complainant at the time of its purchase, either knew, or ought to have known, that said power of attorney either divested the maker of it of all her beneficial interest in the land, some four months prior to the additional entry in the land office at Olympia, and therefore falsified the statements of the application and affidavits, whereby the entry was made, or that, at the time when it left the possession and control of its maker, said power of attorney was a mere blank, utterly void, and that by subsequently filling the blanks, so as to make it appear complete and valid, a forgery was committed. My conclu-

sions are that the attempted transfer of rights acquired under the homestead laws to the claimant was not *bona fide*; that the cash entry was not authorized by the act of June 15, 1880; and that no rights adverse to the government can be acquired by an entry not authorized by law, even though sanctioned in advance by a commissioner of the general land office.

The facts in the above case were almost identical with those in the case under consideration. Sabin, Wilder, and the Mississippi Logging Company all claim to be purchasers in good faith and for value, through Walker, the attorney in fact of Morris, of the title to the tract in controversy.

Following the reasoning of the circuit court in the case of the Puget Mill Co. v. Brown, *supra*, Sabin and Wilder must have had knowledge of all the facts surrounding the execution of the power of attorney by Morris and wife to Walker, have known that said instrument did not divest Morris of his additional right, and that the entry thereunder by Walker was without authority of law. Hence, none of them can claim to have acquired any rights to the tract in question by transfer from Walker, through the execution by him of an alleged *bona fide* instrument in writing; they are bound to take notice of any defect that may exist or appear in the record of their title, and hence are not entitled to relief under the act of June 15, 1880.

For the same reasons and by virtue of the same logic used by the circuit court in said cause, I hold that they are not *bona fide* purchasers within the meaning of the body of section 7 of the act of March 3, 1891.

But it is urged that said entry is saved by the proviso to section 7 of the act of March 3, 1891, for the reason that it stood unchallenged for more than two years after its reinstatement August 7, 1882.

This position is not a tenable one. The reinstatement of said entry was for the express purpose, as stated, of examining into its *bona fide* character, and was an express continuation of the attack made upon it, or was itself a direct attack upon the validity of said entry by directing attention to its *bona fides*.

Nor is said entry saved by the third proviso of the act of March 3, 1893 (27 Stat., 593), which in terms provides—

that where soldiers' additional homestead entries have been made or initiated upon certificate of the Commissioner of the General Land Office of the right to make such entry, and there is no adverse claimant and such certificate is found erroneous or invalid for any cause the purchaser thereunder on making proof of such purchase may perfect his title etc.

The practice of issuing certificates of right by the Commissioner of the General Land Office did not arise until after the issuance of the circular of March 10, 1877, herein referred to and was based on the third paragraph of that circular. As the entry in question was made by Walker, as stated, in June, 1875, nearly two years before the origin of the practice mentioned, it is evident that said entry was not made or

initiated upon a certificate of right issued by the Commissioner of the General Land Office, and hence does not come within the confirmatory provisions of the act last quoted.

For the reasons herein stated, your office decision holding the Taylors Falls entry of Morris for cancellation, is affirmed.

CONTEST—PRIORITY OF RIGHT—ESTOPPEL—STIPULATION.

HENRY v. STANTON.

The failure of a party to proceed with a hearing in accordance with departmental directions does not estop him from asserting his priority of right as against the intervening adverse claim of a third party.

The terms of a stipulation entered into between parties to a contest should not be enforced to the exclusion of the real question at issue therein, where it is apparent that said stipulation, with respect to such matter, is without consideration and made apparently through inadvertence.

First Assistant Secretary Sims to the Commissioner of the General Land Office, November 9, 1893.

I have considered the appeal of John W. Stanton from your office decision of June 20, 1892, holding for cancellation homestead entry, No. 4028, in the land district of Helena, Montana, in the case of Charles S. Henry v. said Stanton, involving the SE. $\frac{1}{4}$ of Sec. 25, T. 21 N., R. 3 E.

The plaintiff and defendant are seeking to acquire title to said land under the homestead laws.

Your office concurred in the decision of the local officers, rendered on the 5th day of September, 1891, in which they hold that, from the evidence, Henry is shown to have made the first settlement, and is therefore entitled to a preference right of entry. Stanton denies that the evidence shows such a state of facts, and contends, further, that Henry had no legal standing before the local officers in the last hearing, for two reasons:

1st. Because he had failed to comply with certain provisions of departmental decision rendered April 20, 1891.

2d. Because of a certain stipulation and agreement entered into between plaintiff and defendant on the 10th of July, 1891.

In order to understand how this contention is related to the issue between the parties in this case, it is necessary to recite some facts in the history of the previous litigation, with reference to the land in controversy.

It appears that one Hughes had made a desert land entry on the whole of section 25, including the land now in dispute, in September, 1886; that in July, 1887, one Lux had initiated contest against the entry of Hughes, and applied to enter the SW. $\frac{1}{4}$ of said section; that, afterwards, in November, 1887, Sarah A. McBrine applied to contest the entry of Hughes and to file a declaratory statement for pre-emption of the SE. $\frac{1}{4}$ thereof.

In April, 1888, Henry initiated a contest against the said desert land entry, and applied to enter the SE. $\frac{1}{4}$ thereof.

Hughes relinquished his right to the N. $\frac{1}{2}$ and to the SW. $\frac{1}{4}$ of the section embodied in his desert land entry, and Lux withdrew his contest, waiving all preference right of entry. At the same time W. F. Dean made timber-culture entry for the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section.

William W. Stanton filed pre-emption declaratory statement for the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and George H. Stanton filed pre-emption declaratory statement for the NE. $\frac{1}{4}$.

At this time, it will be remembered, that Lux was eliminated from the litigation, and John W. Stanton had not yet appeared.

In November, 1888, Henry initiated a proceeding before the local officers, making McBrine, Dean, and the two Stantons (Wm. W. and George H.) parties defendant, alleging that his contest was prior to McBrine's; that her papers had been fraudulently placed on file, and praying that the various filings and entries of the defendants be canceled, and that he be allowed to select any portion of said section he chose, for entry.

The petition of Henry was denied by the local officers, and he appealed to the Commissioner of the General Land Office.

After said appeal, and before the decision was made by the Commissioner, Hughes relinquished the remaining portion of land embraced in his entry, McBrine relinquished her claim, and John W. Stanton made homestead entry 4028. Whereupon Henry filed a supplementary paper, asking that Stanton's homestead entry be canceled, and that he be allowed preference right of entry. This was forwarded to the Commissioner, without action, by the local officers.

The decision of the Commissioner upon the appeal of Henry, rendered September 4, 1889, directed that a hearing be had before the local officers, between McBrine and Henry, to determine which had the prior right of contest.

In the departmental decision of April 20, 1891, the same direction is given, and all parties defendant, except McBrine, are dismissed from the case.

Henry was allowed sixty days in which to proceed with his hearing, giving notice to McBrine and J. W. Stanton. Henry did not comply with this direction, and, for that reason, Stanton contends that the case is closed as to him. Now, it will be remembered that Stanton was not a party to the proceedings when Henry took an appeal to the Commissioner of the General Land Office. Homestead entry No. 4028 was not then in existence.

When the departmental decision was made, McBrine had ceased to be a party by relinquishment, and was, of course no longer in the way of Henry. Besides, that decision was made in determining the rights of plaintiff under his contest with Hughes. The case now under con-

sideration is a proceeding to determine his rights under his contest against the homestead entry of Stanton, the parties and cause of action being entirely different. He is not estopped by his failure to procure the hearing directed as aforesaid. This disposes of ground number one.

Defendant made his homestead entry November 28, 1888. Plaintiff filed affidavit of contest January 23, 1889, and in March, thereafter, the testimony in the case was taken before an officer designated for that purpose. The final hearing thereof was postponed until the latter part of the year 1891.

On July 10, 1891, it was stipulated between Stanton and the attorneys for Henry that the above mentioned testimony should "take the place of the hearing which was directed between the parties hereto by departmental decision of April 20, 1891, and that the issue herein shall be deemed and considered to be the same as is defined and directed in said department decision, and none other."

The issue above specified was one between Charles S. Henry and Sarah A. McBrine, and was directed in order to give the former an opportunity to establish his priority of contest as against the latter.

The agreement referred to was an arrangement made to be observed in the approaching homestead contest between the parties to this case, in which the issue is that of prior settlement.

The contention of defendant is, that the terms of said stipulation should have been enforced in the contest trial against his homestead, and that plaintiff should have been limited to the establishment of his priority of contest as against a person who was then a stranger to the case. That portion of the stipulation was without consideration, and was obviously entered into by inadvertence. Its enforcement would have been an absurdity.

The controlling question in the case is priority of settlement, and the record justifies the conclusion at which you have arrived.

The decision is affirmed.

ARID LANDS—RIGHT OF WAY—FINAL CERTIFICATE.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 5, 1893.

Registers and Receivers, U. S. Land Offices.

GENTLEMEN:

The register is hereby directed to write, in red ink, across the face of each final certificate hereafter issued upon an original entry or location made subsequent to the act of October 2, 1888, for public lands lying west of the one hundredth meridian, the following note, viz:

"Patent to contain reservation according to proviso to the act of August 30, 1890 (26 Stat., 391), relating to rights of way for ditches and canals."

The certificate in all pre-emption entries for such lands, made subsequent to that date, should be similarly indorsed, without reference to whether settlement is alleged or declaratory statement filed prior or subsequent to October 2, 1888.

Very respectfully,

Approved:

HOKE SMITH,

Secretary.

EDWARD A. BOWERS,

Assistant Commissioner.

HOMESTEAD CONTEST—SETTLEMENT RIGHTS.

BROWN *v.* HOWLETT ET AL.

The departmental ruling that the notice given by settlement extends only to the quarter section on which the settlement is made, is general in its application, and covers a case of settlement on a tract that has public land on one side only.

First Assistant Secretary Sims to the Commissioner of the General Land Office, December 11, 1893.

This case involves the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and lots 9 and 10 of Sec. 31, T. 40 N., R. 10 E., Wausau land district, Wisconsin, and is before the Department upon appeal by Orrin W. Avery from your office decision of July 11, 1892, awarding lot 9 to Orrin W. Avery, lot 10 to Daniel W. Brown, and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ to the entryman Henry Howlett. This decision was reached as the two settlers Avery and Brown had settled upon the respective lots simultaneously, and as neither of them had made any acts of settlement upon the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, lots 9 and 10 not being on the same quarter section, the decision appealed from held that the homestead entry should remain intact as to the portions upon which no settlement was made.

There is no issue as to that portion of the decision giving lot 10 to Daniel W. Brown, and Avery, in his appeal, raises only the question as to that part of the decision that awards land to the entryman, and argues at length that the holding of this Department that the notice given by settlement extends only to the quarter section upon which the settlement was made is erroneous. That rule is too well established now to consider the argument, and is too well supported by equity to need any defense. But it is further urged that in the particular case at bar, as there was only government land on one side, settlement on either lot 9 or 10 could only be construed to mean settlement upon sufficient land to constitute a quarter section, and as the amount over and above lots 9 and 10 to make a quarter section could only be had from the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ that the notice given by settlement on either

lot 9 or 10 must have extended to that portion which, under the decision appealed from, was given to the entryman. The rule of this Department above cited, is a general one, applying in all cases, and is not affected by the circumstances here urged, and after an examination of the record and evidence, it appears that the decision appealed from was correct, and the same is hereby affirmed.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

O'DWYER *v.* HERRON.

The confirmatory provisions of the body of section 7, act of March 3, 1891, extend to an entry made by a minor, if such entry is otherwise within the terms of said section.

First Assistant Secretary Sims to the Commissioner of the General Land Office, December 9, 1893.

I have considered the case of Robert O'Dwyer *v.* John E. Herron, involving the pre-emption cash entry made by the latter for the SE. $\frac{1}{4}$ of Sec. 35, T. 111, R. 79, Pierre land district, South Dakota.

Edmund H. Roche, alleging himself to be a transferee, applied to intervene, asking for confirmation of the entry for his benefit, under the 7th section of the act of March 3, 1891 (26 Stat., 1095). Your office decision of July 2, 1892, held that the entry was confirmed by said act. From said decision the contestant has appealed.

The principal ground of appeal, and the one upon which contestant's counsel in his argument appears to rely as being conclusive is, that your office erred—

In holding that this case should be governed by the construction of section 7, of the act of March 3, 1891, as made in the case of Axford *v.* Shanks (12 L. D., 450, and 13 L. D., 292), and in the case of Joseph Rush (14 L. D., 522), for the reason that the entry in question was void *ab initio*.

The ground of his contention that the entry was void *ab initio* lies in the fact (alleged) that the entryman was not twenty-one years of age at the time when he made the entry.

The Department, however, has frequently decided, notably and recently in the case of Bomgardner *v.* Kittleman (17 L. D., 207), that an entry made by a person under twenty-one years of age is not void *ab initio*.

Counsel's contention that the transferee had sufficient notice that the entry was void is irrelevant in view of the fact that it was *not* void; and his citation of Roberts *v.* Tobias (13 L. D., 556), and Robert L. Garlichs (12 L. D., 459) in support of his contention, have no bearing, in view of the fact that the question at issue in said cases was whether certain canceled entries should be reinstated in order to be confirmed, while in the case at bar the entry has not been canceled.

There are nine allegations of error in the appeal to the Department, one of which requests the consideration of the ten allegations of error in the appeal from the local officers to your office, making a total of nineteen of such allegations. The most of these are dependent upon the principal one above cited, and an answer to one is an answer to all this class of allegations. The others are for the most part immaterial or irrelevant. Thus counsel alleges that your office erred—"In finding as a fact that the contest herein was begun December 23, 1890, as the affidavit of contest was filed March 24, 1890."

Whether the contest was begun March 24, or December 23, 1890, is wholly immaterial, in view of the other facts in the case.

Counsel alleges that your office was in error in holding the entry for confirmation "for the reason that it does not appear from the testimony that the land had not been reconveyed by Roche to the claimant Herron."

The abstract of title filed in the case shows no such reconveyance; and the certificate accompanying the same states that it "is a full, complete, and correct abstract of *all* conveyances upon record affecting the same." Counsel for contestant does not show that said certificate is false, or that there has been any such reconveyance.

The entry in question possesses all the qualifications requisite to its confirmation under the 7th section of the act of March 3, 1891. It was uncanceled and in existence at the date of the passage of said act; final proof had been made and certificate issued; there was "no adverse claim originating prior to final entry;" it had been "sold or encumbered prior to the first day of March, 1888, and after final entry, to *bona fide* purchasers or encumbrancers, for a valuable consideration;" and no government agent had found fraud on the part of the purchaser. I therefore affirm the decision of your office holding the entry for confirmation.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

UNITED STATES *v.* WAGNER.

A mortgagee is not entitled to protection under the confirmatory provisions of section 7, act of March 3, 1891, if the mortgage is executed prior to the submission of final proof and issuance of certificate thereon.

First Assistant Secretary Sims to the Commissioner of the General Land Office, November 24, 1893.

I have considered the case of the United States *v.* Amelia Wagner, on appeal by the McKinley Mortgage and Debenture Company, transferee, from your office decision of July 18, 1892, holding for cancellation pre-emption cash entry No. 3684, of Amelia Wagner, for the SE. $\frac{1}{4}$ of Sec. 9, T. 32 R. 39 W., of the Garden City land district, Kansas.

This case is now before the Department the second time for adjudication.

December 1, 1886, the said Amelia Wagner made said entry for the land in controversy. January 18, 1888, the entry was held for cancellation upon the report of Special Agent Clary, alleging that claimant did not maintain a continuous residence on the land. Mrs. Wagner made application for a hearing, which was ordered April 20, 1888, to ascertain the facts, and hearing was held September 13, 1888, and upon the testimony adduced the local officers held that claimant had failed to comply with the law, and recommended the cancellation of the entry. Claimant appealed, and on May 5, 1890, your office approved the finding of the local officers, and held said entry for cancellation, subject to the right of appeal. The case was then brought to the Department on appeal by the McKinley Mortgage and Debenture Company, alleged grantee of the said Amelia Wagner, and on July 6, 1891, it was held here that "The evidence as to the defaults of the entryman fully warrants your judgment, but it would appear that at some time since the allowance of the entry the land has been sold to the appellants herein", and directed that

If the McKinley Mortgage and Debenture Company (alleged grantee) will show to your satisfaction, that it purchased this land in good faith, prior to March 1, 1888, and in all respects comply with the circular of May 12, 1891 (12 L. D., 450), patent will issue for the land described, under the provisions of section seven of the act of March 3, 1891. If the appellant fails to comply with these requirements within ninety days from notice of this decision, the judgment of your office will stand affirmed, and the said entry will be canceled.

On July 18, 1892, as aforesaid, your office, after considering the evidences of title of the said McKinley Mortgage and Debenture Company, held the same insufficient to entitle said company to any consideration as grantee under the law, and again held said Wagner's entry for cancellation. From this decision the said alleged grantee again appealed, and the case is now before the Department on assignment of errors substantially of law and of fact.

The question as to the rights of the said Amelia Wagner, by virtue of her entry, settlement and improvements, has been passed on by the Department and is *res judicata*, and the only thing now to be considered is the right of the said entryman to patent for the land, out of consideration for the alleged equities of the appellants under and by virtue of an act approved March 3, 1891, (26 Stat., 1095) entitled "An act to repeal the timber culture laws, and for other purposes."

Said act provides that—

All entries made under the pre-emption, homestead, desert land or timber culture laws, in which final proof and payment may have been made, and certificates issued, and to which there are no adverse claims, originating prior to final entry, and which have been sold or incumbered prior to the first day of March, 1888, and after final entry to bona fide purchasers or incumbrancers for valuable consideration, shall, unless upon investigation by a government agent, fraud on the part of the purchaser

has been found, be confirmed and patented, upon satisfactory proof to the Land Department of such sale or incumbrance;

and by departmental circular of March 8, 1891, satisfactory proof of sale or incumbrance

should consist of the original deed or mortgage from the entryman, and also all deeds showing title in the present claimant, or certified copies of such instruments, or a certified abstract of the proper records showing the chain of title back to the entryman, together with satisfactory proof that the incumbrance has not been discharged, or that the land has not been reconveyed to the entryman.

It appears from the record that the entryman Amelia Wagner made final proof and payment, and received certificate December 1, 1886. The mortgage under which appellant claims, bears date November 1, 1886. Appellant asserts that this is not the true date of the execution of said instrument, but was only assumed as a nominal date under their regulations, for the purpose of expediting business, and allege that said mortgage was in fact executed November 23, 1886, that being the date of the acknowledgment of said mortgage, but even admitting the truth of this contention, I fail to see how appellants are aided thereby. The act of March 3, 1891, (*supra*) as has been seen, applies only in cases "in which final proof and payment may have been made, and certificate issued", and in the case at bar this condition precedent, is lacking, for the reason that certificate did not issue until December 1, 1886, eight days after the alleged true date of the mortgage. This provision of said act must be construed strictly. If it were otherwise, all fraudulent entries could have been protected by incumbrances executed prior to the offering of final proof in anticipation of its rejection, and in this way been protected from cancellation.

Entertaining this view, it is unnecessary to notice the question as to whether title is shown in the present claimants. The judgment of your office is hereby approved and affirmed.

OKLAHOMA LANDS—SETTLEMENT RIGHT.

DEAN *v.* SIMMONS.

One who is unlawfully within the territory of Oklahoma prior to the time fixed for opening the lands therein to settlement, and takes advantage of such presence to select land in advance of others, is disqualified thereby to make entry of land in said territory, though he subsequently goes outside of the boundaries thereof and there remains until the time fixed for opening.

First Assistant Secretary Sims to the Commissioner of the General Land Office, November 18, 1893.

On the 27th of May, 1889, James H. Simmons made homestead entry for lots 1 and 2, and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 30, T. 19 N., R. 3 E., Guthrie land district, Oklahoma.

On the 20th of June, 1889, Alvah L. Dean filed an affidavit of contest against said entry, alleging that Simmons settled upon and occupied said tract prior to the 22d day of April, 1889, and before 12 o'clock noon of said day, and subsequent to the President's proclamation opening said land to settlement, in violation of the act of Congress, and of the President's proclamation in conformity therewith. With his contest affidavit, Dean filed an application to make homestead entry for the land.

A hearing followed, which resulted in a decision by the local officers on the 7th of January, 1891, in which they said:

We find from the evidence that the entryman, James H. Simmons, entered upon and occupied lands in Oklahoma prior to noon of April 22d, and subsequent to March 2, 1889, in violation of the act of March 2, 1889, and the proclamation of the President issued in pursuance thereof. We recommend that said entry be canceled, and that contestant be awarded a preference right of entry.

From such decision Simmons appealed to your office. While such appeal was pending, to wit, on the 17th of September, 1891, Frances E. Dean applied to make homestead entry for the land. Her application was rejected on account of the prior entry of Simmons, and the pending contest of Alvah L. Dean against said entry. From such action by the local officers she appealed to your office, and in her appeal she alleged that Alvah L. Dean, the contestant against the entry of Simmons, was her husband, and that he died on the 13th of September, 1891. As his preference right was lost by his death, she asked that she be allowed to enter the tract as the first legal applicant, in case the entry of Simmons should be canceled as the result of said contest.

On the 19th of March, 1892, a decision in the case was rendered by your office, in which the judgment of the local officers in the contest against the entry of Simmons was affirmed, and said entry held for cancellation, subject to the usual right of appeal. The decision of the local officers, in rejecting the application of Mrs. Dean to make homestead entry for the tract, was also affirmed, with the right of appeal, of which she did not avail herself.

The attorney for Simmons accepted notice of your office decision of March 19, 1892, on the 24th of that month, but made entry on his contest docket that such service was accepted on the 31st of March. This mistake was not discovered by him until the 28th of that month, when he went to the local office to obtain some data upon which to base an appeal in the case. He was then informed that his time for appeal had expired, that the entry of his client had been canceled, and that another entry for the land had been allowed. He perfected his appeal, and tendered it at the local office, which was rejected as not being in time, and thirty days were allowed for appeal from said decision.

Such appeal was taken, and on the 29th of June, 1892 your office advised the local officers that they were without authority to cancel the

entry of Simmons, without instructions to that effect from your office, and that the homestead entry of Mrs. Dean had been improperly allowed, and suspended the same. Your office also refused to accept the appeal of Simmons, on account of not having been filed within the time allowed by the rules of practice, and allowed him twenty days within which to apply to the Secretary of the Interior for a writ of certiorari, under rules of practice 83 to 85 inclusive. Within the time allowed, such writ was applied for, and granted by the Secretary on the 3d of December, 1892 (15 L. D., 527). On December 16, 1892, your office certified the record to the Department, in accordance with the instructions contained in said writ, and the questions presented by the appeal of Simmons from your office decision of March 19, 1892, are now before me for determination.

The evidence at the hearing established the fact that Simmons, with several other persons, was within the Territory of Oklahoma in the month of March, and the fore-part of April, 1889, and engaged in examining and selecting tracts of land which they desired to secure as homesteads. That they searched for corner stones and section lines, and engaged in surveys by which they were enabled to designate the lands desired by them.

After being made aware of the provisions of the act opening the lands to settlement, and of the contents of the President's proclamation in conformity therewith, Simmons, and some of the other persons who had been engaged as above stated, went outside the Territory, and remained outside until twelve o'clock noon on April 22, 1889. He reached the land in question between half-past twelve and one o'clock on that day, the land being the same, or in the immediate vicinity of that upon which he had camped, when he was prospecting within the Territory prior to that time.

There are several errors in the decision complained of, enumerated in the notice of appeal before me, but the principal question involved in the case is stated in the sixth, which is as follows:

That the Honorable Commissioner erred in holding that the presence of defendant in the Territory, his camp in the immediate vicinity of the tract which he finally entered, and his participation in the crude surveys are such evidence of advantage gained over others who were not in the Territory prior to noon of April 22, 1889, as to warrant the cancellation of defendant's entry.

The question presented in this specification, has been repeatedly passed upon by the Department, and it has been uniformly held, that persons who were within the Territory prior to its opening for settlement, and who took advantage of their presence to secure lands in advance of others were disqualified to make entries. This has been the ruling in cases where persons were *lawfully* within the Territory, and with much greater reason should it be so held in reference to those who were unlawfully therein. A few of the late departmental decisions upon this question are *Winans v. Beidler* (15 L. D., 266); *Hagan v. Severns*

et al. (15 L. D., 451); *South Oklahoma v. Couch et al.* (16 L. D., 132); see also *Smith v. Townsend* (148 U. S., 490).

Of the fact that the presence of Simmons in the Territory prior to its opening for settlement was unlawful, and that he took advantage of such presence to the disadvantage of others, there can be no doubt. He is therefore disabled to make entry in said Territory, and the decision appealed from is accordingly affirmed.

APPLICATION TO ENTER—PRELIMINARY AFFIDAVIT.

ADY *v.* BOYLE.

An entry based upon an application and preliminary affidavit executed while the land is not subject to disposal is invalid, and the defect can not be cured in the presence of an intervening adverse claim.

First Assistant Secretary Sims to the Commissioner of the General Land Office, December 15, 1893.

I have considered the case of C. E. Ady *v.* Zipporah Boyle, on appeal by the latter from your decision of March 12, 1892, holding for cancellation her timber culture entry for the NE. $\frac{1}{4}$ of Sec. 29, T. 123 N., R. 73 W., Aberdeen land district, South Dakota.

The facts are fully set forth in your decision appealed from, and need not be repeated here, further than to say that Mrs. Boyle, or her attorney for her, filed the relinquishment of Julius H. Hoffman (executed January 3, 1889,) for the land in contest on January 25, 1889, and on the same day made entry of the tract upon entry papers that had been *previously executed* by her. Thereupon your decision held that her entry was invalid, and could not be allowed to stand, "for the reason that there was a valid entry upon the land at the time of the execution of the papers."

The appeal alleges "that said decision was contrary to the practice established in the local land office prior to said decision, and" it "was the practice at the filing of said relinquishment to accept filings that were dated prior to the filing of the relinquishment.

On December 22, 1877, this Department rendered a decision in the case of Hiram Campbell (5 C. L. O., 21), holding that—

In no case can an affidavit made while the land is appropriated, under the provision of law, be received. To allow such a course would be an encouragement to the sale of claims on the part of settlers—a practice not recognized by law or sanctioned by this Department.

On January 8, 1878, your office issued a circular to registers and receivers (4 C. L. O., 167), which, after referring to the fact "that applications, and sometimes affidavits, in blank, are left in the hands of district officers, prior to the cancellation of entries, to be filled out with dates

and duly recognized when notice of such cancellation is received," said in conclusion—

You are hereby instructed not to take or hold in your possession such papers, nor recognize them when presented by attorneys, where you know them to have been actually made by the applicant at a date prior to the time when the land applied for was legally liable to disposal.

The above mentioned circular quoted instructions to the same effect from the prior circulars of May 18, 1876, and December 1, 1877. The same principle has since been applied in the departmental decisions of Johnson Barker (1 L. D., 164); Staab *v.* Smith (3 L. D., 320); Holmes *v.* Hockett (14 L. D., 127); and others. In the case of Hiram Campbell (*supra*), the applicant, "in the absence of any adverse claim," was permitted to file a supplemental affidavit, and thus perfect his application;" but in the other cases cited, adverse claims had intervened, and this was not allowed. In the case at bar the applicant did not offer to amend and perfect her application until an adverse claim had intervened.

The applicant is manifestly incorrect in her contention that the fact that the officers of the local office where this entry was made had habitually violated your frequently reiterated instructions, and disregarded numerous departmental decisions, constitutes a reason why the land department should now abandon its long-established, uniform and consistent practice.

The only other error alleged is, "because said decision was contrary to law and the rules and practice of the land department." This allegation is not sufficiently specific to warrant consideration (Levi W. Hulbert, 12, L. D., 29). Your decision is affirmed.

SUCCESSFUL CONTESTANT—NOTICE OF CANCELLATION—ALIEN.

BJORNDahl *v.* MORBEN.

A successful contestant is not required to exercise his preferred right of entry until he has received due notice of the cancellation secured by his contest. The alienage of a contestant will not defeat his subsequent exercise of the preference right, if he is qualified in the matter of citizenship when he applies to enter.

First Assistant Secretary Sims to the Commissioner of the General Land Office, December 15, 1893.

On a contest brought by Soren N. Bjordahl, your office on April 9, 1889, canceled homestead entry No. 5996, made by Peter E. Sandager, July 18, 1882, for the SE $\frac{1}{4}$, Sec. 34, T. 158 N., R. 56 W., Grand Forks, North Dakota.

On April 13, 1889, the local officers, by registered letter, notified B. Erickson, contestant's attorney, of the cancellation and of the preference right of entry, addressing the letter to Langdon, Dakota.

About the time the case was transmitted from the local office to your office, Erickson removed from his former place of business—Park River, Dakota—to Langdon, in the same State, and it not being convenient for him to act longer as the attorney, Bjorndahl dismissed him, and appointed one J. H. McCullough as his attorney, and so notified the local officers, who made a note of the change upon their records. But the substituted attorney was not notified of the cancellation, nor did Bjorndahl receive such notice until settlement was made on the land by another, as hereinafter shown.

On June 14, 1889, Reinhart C. Morben filed his pre-emption declaratory statement for the land, alleging settlement thereon May 29 of that year, and, on June 21, 1889, Bjorndahl filed his declaratory statement for the land, alleging settlement June 13, 1889.

After due publication of notice, Morben submitted final proof before the register and receiver, on January 29, 1890, and, on the same day, Bjorndahl filed his protest against its acceptance. The register and receiver recommended that Bjorndahl's filing should remain intact, for the reason that he had not been notified of his preference right of entry as a successful contestant, and that Morben's filing "be cancelled without prejudice."

On appeal, your office by decision, dated March 24, 1892, held Morben's filing for cancellation, for the reason that his residence on the land was not sufficient to establish his good faith.

A further appeal brings the case to this Department.

It sufficiently appears that Bjorndahl did not have notice of the cancellation of Sandager's homestead entry, and of his preference right of entry. Having advised the local officers of his substituted attorney, and a note of that change having been made on the records of the local office, the notice thereafter sent to his first attorney, who, in the meantime, had moved away, was not a sufficient notice to him, and he was entitled to thirty days from the receipt of notice of the cancellation of the entry within which to exercise his preference right, notwithstanding a filing had been made by another, duly qualified, after the expiration of the thirty days generally given to a successful contestant. *Walker v. Mack*, 5 L. D., 183; *Robertson v. Ball et al.*, 10 L. D., 41.

It appears that Bjorndahl was an alien, and that he did not declare his intention to become a citizen of the United States until June 5, 1889, six days after Morben had made settlement on the land.

Under the terms of section 2 of the act of May 14, 1880 (21 Stat., 140), the question of the qualification of a contestant to make entry does not arise until he applies to exercise that right (*Moore v. Lyon*, 4 L. D., 343). Bjorndahl's thirty days notice not having expired when he filed for the land (June 21, 1889), and having then declared his intention to become a citizen, his rights were superior to those of Morben, although the latter's filing was first of record.

I think the register and receiver properly disposed of the case. The

question of whether Morben did or did not continuously reside on the land is immaterial.

The conclusion reached in your said office decision is correct, and the same is therefore affirmed.

TIMBER CULTURE CONTEST—JURISDICTION.

HATTER *v.* CARMACK'S HEIRS.

The question of jurisdiction is one that may be raised at any stage of the proceedings, and a judgment on the merits of a case should not be rendered where it is found that jurisdiction of the person of the defendant has not been obtained.

In proceedings against the heirs of a timber culture entryman jurisdiction is not acquired in the absence of notice to all the heirs, or due appearance on their part.

First Assistant Secretary Sims to the Commissioner of the General Land Office, December 15, 1893.

On the 6th of September, 1887, Cornelius Carmack made timber culture entry for the NE. $\frac{1}{4}$ of Sec. 13, T. 17 S., R. 27 W., Wa-Keeney land district, Kansas.

On the 8th of September, 1890, William E. Hatter filed an affidavit of contest against said entry, alleging that the entryman while living, failed to comply with the requirements of the timber culture law, specifying the particulars in which he made default, and that his heirs, since his death, had failed to cure his laches, and that said failures still existed. He also made oath that the entryman died the latter part of January, 1890, leaving a wife and one son as his heirs, and leaving no will. He also stated that he was not acquainted with the given names of said wife and son, who were the only heirs of said deceased entryman. With these affidavits he filed his application to make timber culture entry for the land.

Notice for hearing was thereupon issued, citing the parties to appear at the local office on the 7th of November, 1890. On that day, the contestant applied for a continuance to January 6, 1891, in order that service might be made upon the parties. His application was allowed, and a new notice issued, directed to "Zilpha Carmack, widow, and Caciun C. Carmack, son, the heirs and legal representatives of Cornelius Carmack, deceased."

A copy of the notice was mailed to the widow, in registered letter, directed to Portland, Oregon, and received by her on the 20th of November, 1890. The copy to the son was received by him at Larned, Kansas, on the 14th of November, 1890, according to the return registry card. No other service was made upon them, and no other parties were served.

The local officers report that at a hearing on the 6th of January, 1891, the contestant appeared in person and by attorney, and that

"A. H. Blair, Esq., entered an appearance for the defendant, Zilpha Carmack, and for Carrie E. Byers and Wiley N. Carmack, who claimed to be legal heirs of Cornelius Carmack, deceased, and the defendant Caciue C. Carmack, although present during the trial, entered no appearance, and did not participate therein."

At the hearing, after the contestant's proof had been submitted, there was offered in evidence, an affidavit made by Carrie E. Byers, in Stark county, Indiana, on the 26th of December, 1890, in which she made oath that she was over twenty-one years of age, and a daughter of Cornelius Carmack, deceased, the entryman in this case, and that she was first informed on the 20th of December, 1890, that a contest had been filed against said entry, and that no notice of such contest had been served on her prior to that date. A similar affidavit was presented, made by Wiley N. Carmack, who made oath that he was a son of the deceased entryman, and over twenty-one years of age.

A paper to which the names of the parties making these affidavits is signed, which authorized A. H. Blair to appear as their attorney in this contest case, forms part of the record before me. Blair filed no authority to appear for any of the other defendants, nor did he file any formal appearance in the case, although he took part in the trial.

The attorney for the contestant was sworn in behalf of his client, and stated that he was informed and believed that Caciue C. Carmack was a minor, under the age of twenty-one years, but that he had been unable to ascertain the name or residence of his guardian, or to procure any service upon him.

On the 6th of February, 1891, the local officers rendered a decision in the case, in which they found that there was no proof in the case, showing that service had been made upon Caciue C. Carmack, or that he was not an infant. They said:

An examination of the papers in the case discloses a receipt for a registered letter, mailed November 8, 1890, and a registry return receipt therefor, bearing the stamp of the receiving post office, of November 14, 1890, but there is no affidavit or other proof to show what the contents of such letter were, or the age of the defendant, Caciue C. Carmack.

On the 14th of March, 1891, the local officers rendered a second decision in the case, in which they found that no sufficient notice had been served upon the defendant, Caciue C. Carmack. The notice served was therefore vacated and set aside, and they allowed the contestant thirty days "within which to apply for a new notice to be served on said Caciue C. Carmack, or his legally appointed guardian, as the law shall, upon a full investigation of the facts, be found to require, and in the event of his failure to so apply for a new notice, that this case should be dismissed."

On the 21st of April, 1891, they rendered a third and final decision in the case, in which they stated that the contestant had failed to apply for a new notice, or to make any other or additional service upon Caciue

C. Carmack, but had filed exceptions to their ruling, evidently intending to stand upon such exceptions. They expressed the opinion that their former ruling in the case was correct, and said: "In accordance therewith, we now hold that this case should be dismissed for want of prosecution by the contestant."

From the action of the local officers, an appeal was taken, and on the 25th of March, 1892, your office found that they had correctly disposed of the case upon the question of jurisdiction. Upon the testimony taken at the hearing your office found that the contestant had failed to sustain the charges contained in his contest affidavit. With such modification, the decision of the local officers was affirmed.

A further appeal brings the case to the Department, and among the objections urged, is that the decision upon the merits of the case was contrary to the evidence submitted at the hearing. This raises the question whether any judgment upon the merits of the case was proper, after your office had found that jurisdiction of the person of the defendants had never been obtained in the case. In other words, can a court, which has no jurisdiction of the person of the defendants, render a judgment in an action which determines their property rights? I am clearly of the opinion that this cannot properly be done. It must be admitted, that if judgment in such a case can be rendered in favor of the defendants, one could, with equal propriety, be rendered against them. The bare statement of the proposition exhibits its absurdity. It would lead to allowing a person to come before a court and make a statement of facts, which he claimed to be able to prove, and to ask the court if, upon such showing, he could succeed in case he should bring an action. This is not the purpose and province of courts and judges, but rather to determine issues properly joined, after the parties have been legally brought before them.

It was established as a fact in the case, that Cornelius Carmack, when he died, left a widow and three children, the youngest child being a minor. No service of notice of the hearing was in any manner made upon the two adult children, while the only service which was claimed to be made upon the widow and minor son, was by mailing to their address, copies of such notice in registered letters, which letters were received by them. While service of notice of contest by registered letter was recognized as sufficient at the time this contest was initiated, the local officers held that no legal service in this case had been made upon the minor defendant.

In his appeal to the Department the contestant urges that it was not the province of the local officers to raise the question of proper service, but that the defendants were the only proper persons to object to their jurisdiction on that ground. He also insists that the question should have been raised before proceeding to trial, and that the objection of the local officers comes too late. In this he is in error. The question of jurisdiction is one that may be raised at any stage of the

proceedings, and upon slight suggestion in all tribunals; and where doubt of such jurisdiction arises, it is usual and proper to look fully into the reason and authority of the matter, in order that a judgment may not be improvidently rendered, which may have no binding force on account of a want of jurisdiction in the case. (Rancho Alisal, 1 L. D., 173).

The contestant, in his appeal, calls attention to the fact that the laws of Kansas allow service of summons upon minors over fourteen years of age, the same as upon adults, and does not require service in such cases, upon parents or guardians. While this is so, such service must be made in accordance with law, and the minor is not authorized to appear as a defendant, other than through a guardian *ad-litem*, duly appointed by the court.

It is not necessary to point out the difference between an action commenced by summons, and a contest against a timber culture entry. It is sufficient to find that the service in the case at bar did not confer jurisdiction upon the local officers, over the person of the minor defendant, and authorize them or your office to render a judgment in the case upon its merits.

Appearance by attorney having been made on the part of the widow, without objection to the sufficiency of the service upon her, and the adult children having authorized an appearance by attorney for them, the local officers had jurisdiction of three of the four defendants. Of the person of the infant defendant, however, no jurisdiction was obtained, although the contestant was allowed ample opportunity by the local officers to secure service upon him, after it was made to appear that no proper service had been made. Of this opportunity he refused to avail himself, and the local officers thereupon very properly dismissed his contest, on the ground that they had not such jurisdiction of the person of all the defendants as would authorize them to render a judgment in the case upon the merits.

Notwithstanding this action by them, and the concurrence in its correctness, your office proceeded to render a judgment upon the merits of a case in which it had just held that it was without jurisdiction. In so doing, there was error, and that part of the decision of March 25, 1892, in which the merits of the controversy were passed upon, is hereby set aside, while that part thereof in which the action of the local officers was approved and the contest dismissed, is affirmed. The decision appealed from is modified accordingly, and the contest of Hatter is dismissed.

PUBLIC SURVEYS—MAXIMUM RATES.

STATE OF CALIFORNIA.

To warrant the allowance of maximum rates for surveys of "exceptional" difficulty under the act August 5, 1892, the lands must present increased difficulties of survey over and above those justifying the intermediate rates of mileage.

Special instructions with respect to the field notes should be given to deputy surveyors where maximum rates are claimed.

Secretary Smith to the Commissioner of the General Land Office, December 16, 1893.

I am in receipt of your office letter "E" of November 29, 1893, and enclosures, relative to surveys in Twps. 30 and 31 S., R. 16 E., and Twp. 29 S., R. 15 E., M. D. M., California, designated in contract No. 110, dated June 16, 1893.

In your said letter you state—

As that portion of the liability of contract No. 110 (\$1,440) is chargeable to the appropriation for public surveys for the fiscal year ending June 30, 1893, it is desirable that the available appropriation may be utilized; also that the surveys payable from the special deposits should be eliminated from the contract by the issuance of supplemental special instructions and the surveys embodied in a new contract.

I have, therefore, the honor to recommend that this office be authorized to approve contract No. 110, providing for the survey of T. 29 S., R. 15 E., and partial surveys of Tps. 30 and 31 S., R. 16 E., M. D. M., California; liability to the extent of \$1,440, payable from the appropriation for public surveys for the fiscal year ending June 30, 1893; also that maximum rates of mileage (\$18, \$15, \$12), as therein allowed for the survey of mountainous, heavily timbered, or underbrush lands, be approved.

I approve the recommendations contained in your said letter of November 29, 1893, expressed in the above quoted extracts from the same, except as to the allowance of the maximum rates (\$18, \$15, \$12) of mileage for the survey of lands that are "*mountainous, heavily timbered, or covered with dense undergrowth.*" For the survey of lands of that character, the acts of August 5, 1892 (27 Stat., 369), and March 3, 1893 (27 Stat., 592), provide for the payment of the *intermediate* rates (\$13, \$11, \$7) of mileage, in the State of California. You are, however, authorized to allow the maximum rates of mileage for the survey (under contract No. 110) of lands of the character which warrant such rates, as provided in said act of August 5, 1892 (*supra*), in words as follows—

And in case of exceptional difficulties in the surveys, when the work can not be contracted for at these rates (intermediate rates), compensation for surveys and resurveys may be made by the said Commissioner, with the approval of the Secretary of the Interior, at rates not exceeding eighteen dollars per linear mile for standard and meander lines, fifteen dollars for township and twelve dollars for section lines.

"Exceptional difficulties" within the meaning of the statute must be other and different difficulties from those encountered in the survey of lands that are "*mountainous, heavily timbered, or covered with dense undergrowth,*" and the lands for the survey of which the said

maximum rates are allowed, must present *increased difficulties* of survey over and above those upon lands justifying the intermediate rates of mileage. Whenever such *exceptional difficulties* are met with along the lines of survey, the deputy doing the work, must accurately and fully describe the exact nature and extent of the same. A failure to do so will be a bar to his receiving the maximum rates of compensation for his work.

In all cases where the maximum rates are claimed, you will direct the surveyor-general to instruct the deputy doing the work to make accurate note and description, at the end of each mile run in the entire survey, of the exact character of the land over which the lines of survey pass, using all possible diligence and precaution practicable, observing a faithful compliance, in his supervision of the public surveys in his district, with the provisions of section 2223, Revised Statutes (2 Ed., p. 390), to ascertain if the field notes returned to you for approval are correct in every particular, especially in regard to the character of the lands surveyed. You will direct that separate accounts be made out, after the completion of said surveys, chargeable to the two funds, and upon the return to your office of the plats and field notes of the designated surveys, and the accounts based thereon, you will cause a critical examination and careful comparison to be made of said account and field notes, in order to ascertain if the rates of mileage charged in the account correspond with and are warranted by the character of the land surveyed, as described in the field notes.

RAILROAD GRANT—PRE-EMPTION CLAIM—SELECTION.

HOLTEN *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

The act of May 9, 1872, extended the life of pre-emption filings for the period of one year in certain States, and land embraced in a filing thus kept alive is excepted from the operation of an indemnity-withdrawal.

The right of a qualified settler on land excepted from an indemnity-withdrawal defeats a subsequent selection under the grant.

First Assistant Secretary Sims to the Commissioner of the General Land Office, December 16, 1893.

I have considered the appeal of Lasse J. Holten from your office decision of January 5, 1892, in the above entitled cause, said appeal having been transmitted to this Department by letter "F" of October 11, 1892.

The facts disclosed by the record in this case are substantially as follows:

On May 11, 1870, Ole Oleson filed pre-emption declaratory statement No. 2682, alleging settlement May 1, 1870, upon the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 7, T. 124 N., R. 37 W., of the 5th P. M., in the Marshall, Minnesota, land district, said tract, together with all the lands in said township, having been offered at public sale October 15, 1860.

August 15, 1871, G. Gulbrandson filed pre-emption declaratory statement No. 3153, on the same tract, at Benson, Minnesota, alleging settlement thereon that day.

March 3, 1871, Congress passed an act granting certain lands to the St. Paul and Pacific Railroad Company, to aid in the construction of certain branch lines therein described (16 Stat., 588).

On December 19, 1871, the route of the branch line known as the St. Paul, Minneapolis and Manitoba, St. Vincent Extension, Railway, became definitely located, and the tract above described is situate within the twenty miles (indemnity) limits of said grant for said railway.

In accordance with departmental instructions of December 20, 1871, you did, by letter of February 6, 1872, order a withdrawal of lands for the benefit of said grant, which order was received at the district land office on February 12, 1872.

On said last named date, the filing of Oleson (No. 2332) had expired by limitation of statute; the filing of Gulbrandson was, however intact.

On June 18, 1872, your office was informed by the Secretary of the Interior, in substance, that any order withdrawing lands in accordance with departmental order of December 20, 1871, was thereby revoked.

By letter of June 25, 1872, your office promulgated said order of revocation, and the lands withdrawn were restored to settlement and entry.

By letter of September 3, 1872, the Secretary of the Interior directed your office to rescind the revocation of any order withdrawing lands for the St. Paul and Pacific Railroad, contained in his letter of June 18, supra, and to restore the withdrawal.

These last instructions were complied with at once, and the local officers notified by telegram to "again withdraw the odd sections of land within the limits of St. Vincent Extension Railroad, and to increase even sections in ten mile limits to double minimum," and that said order would take effect from its receipt by them.

On September 4, 1872, this telegram was received at the local land office.

May 19, 1884, the tract in question was selected for the purposes of said grant, in lieu of the SW. $\frac{1}{4}$ of Sec. 5, T. 124 N., R. 31 W., lying within the primary limits of the St. Vincent Extension grant, and covered at the date of definite location by homestead entry No. 7027, made May 17, 1871, final certificate No. 4230, being issued thereon May 9, 1878, which, in due course, was followed by patent.

The plaintiff, Lasse J. Holten, on May 8, 1886, applied to make homestead entry of the tract in controversy, alleging settlement thereon in June, 1883. In order to determine the question of priority between him and the railway company, the local officers ordered a hearing, which occurred September 9, 1886, and at which both parties were present.

The evidence adduced at the hearing establishes the fact that Holten first made settlement upon the tract first herein described, in

June, 1883; that he is of foreign birth, and on November 6, 1883, declared his intention to become a citizen of the United States; that he established an actual residence upon said tract with his family July 23, 1884, which has been continuous; that he has made improvements on said tract, approximating three hundred dollars in value, and that he has continuously cultivated and improved said tract since the date of his first settlement thereon.

On the 25th of January, 1887, the local officers held that the right of a railway company to indemnity land attaches only by selection, citing 3 L. D., 51 and 306, and that as no selection, or application to select, had been made by the defendant railway company prior to settlement and improvement of the tract by Holten, there was no valid adverse claim, and that the selection of said tract by the defendant railway company should be held for cancellation, and that the plaintiff, Lasse J. Holten, should be allowed to make the desired entry.

On appeal, by the railway company, your office by a decision of January 5, 1892, reversed the action of the local office, and denied Holten's application to make said homestead entry.

An appeal from said decision brings the case to this Department.

It is urged by the defendant, as stated by you, and admitted by the attorneys for the plaintiff, that on September 4, 1872, when the final order of withdrawal was received at the local land office, the pre-emption filing of Gulbrandson had expired by limitation of statute, and hence it was concluded that the tract in controversy was at that time "free from homestead and pre-emption rights," as the filing of Oleson had expired prior to the withdrawal of February 12, 1872, and it is stated that said tract was vacant, unappropriated public land at said date, and became at that time reserved for the purposes of said railway grant, and was not subject to settlement and entry under the public land laws while such reservation continued.

By act of May 9, 1872 (17 Stat., 88), Congress provided "that all persons holding pre-emptions upon *any* of the public lands of the United States within the States of Minnesota, Wisconsin, Michigan, and Territory of Dakota, whose final proof has not been made, shall be allowed the additional time of one year in which to make final proof and payment from the time at which such pre-emptions are required to be paid for by the present laws."

Under the general statute governing pre-emptions, Gulbrandson's filing would have expired August 15, 1872. But by the act of May 9, 1872, *supra*, it was extended to August 15, 1873, so that on September 4, 1872, when the final order withdrawing said lands for the purposes of said railway grant went into effect, the filing of Gulbrandson was in full force, and exempted the tract in controversy from the operation of the withdrawal. (13 L. D., 167; 16 L. D., 343.) Gulbrandson allowed his filing to lapse, and the tract in question became vacant unappropriated public land.

At the date of the selection of said tract by the railroad company, in lieu of lands lost in place, Holten's settlement rights had attached thereto, and his intention to become a citizen of the United States had been declared. It follows, therefore, that the claim of the railroad company is subordinate to the rights of Holten to the tract in question, and his entry thereof should have been allowed.

Your office decision is therefore reversed, with directions to notify the local officers to cancel the pre-emption filing of Gulbrandson, and to allow Holten to make homestead entry of the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 7, T. 124 N., R. 37 W., in Minnesota, and to allow him to make final proof thereon.

PRACTICE—AFFIDAVIT OF CONTEST—RESIDENCE.

SILVA *v.* PAUGH.

The Rules of Practice do not require an affidavit of contest to be executed before the local officers.

A charge of abandonment and failure to reside upon the land is sufficiently specific where it is set out "that the defendant has wholly abandoned said tract, that he has changed his residence therefrom for more than six months since making said entry, and that said tract is not settled upon and cultivated by said party as required by law."

Leave of absence is no protection against a contest for abandonment where the entryman prior to such leave has failed to comply with the law.

The serious illness of the entryman's wife can not be accepted as a sufficient excuse for failure to establish residence where such default is charged and proven.

First Assistant Secretary Sims to the Commissioner of the General Land Office, December 16, 1893.

This case involves the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 34, T. 5 S., R. 2 E., San Francisco land district, California.

The record shows that William J. Paugh made homestead entry for the above described tract on July 16, 1888. December 29, 1890, John A. Silva filed an affidavit of contest against this entry, alleging that the entryman had wholly abandoned the land, that he had changed his residence therefrom for more than six months since making the entry, and that the said tract had not been settled upon nor cultivated in accordance with the homestead law.

The testimony was taken before a notary public at San Jose, California, and the case came up for a hearing before the register and receiver February 28, 1891.

March 23, 1891, the local officers rendered their decision, in which they sustained the contest and held for cancellation the entry of Paugh.

March 29, 1891, the claimant appealed, and on June 11, 1892, your office decision affirmed the finding of the local officers.

August 16, 1892, the claimant filed an appeal to the Department, on

the grounds that the decision was contrary to the law and the evidence, and further, that there was no affidavit of contest filed, and no corroborative affidavits.

In reference to the question raised about the affidavits, the record shows that there was an affidavit of contest made before a notary public, which was duly corroborated, and the exception made to it upon appeal is, that as it was sworn to before a notary public, it has no legal effect; in other words, that an affidavit of contest should be made before the register and receiver. There seems, upon examination of the Rules of Practice, no just ground for this contention. Rule 2 provides that affidavits of contest must be filed with the register and receiver, but no where does it appear that the affidavit must be made before them. It is further urged that the affidavit is not sufficiently specific, and for that reason is fatally defective. Upon this point it appears that the contestant rests upon the charge that the claimant has never established residence upon the land, and that he had wholly abandoned the same. Counsel for appellant quotes the case of *Sims v. Busse et al.* (4 L. D., 369). The syllabus of that case is, "Where fraud or illegality is relied upon as the ground of contest, the allegations thereof should be specifically made." But that was a case where the allegation was fraud, and the defendant was entitled to have the charge specifically set forth, in order that he might prepare his defense, but the claimant was here notified by the contest affidavit that the issue would be abandonment, and the language used in the blank form issued by the local officers, was sufficient in itself to put the defendant upon notice of the issue joined. It is therefore held that where the contestant alleges that the defendant "has wholly abandoned said tract, that he has changed his residence therefrom for more than six months since making said entry, and that said tract is not settled upon and cultivated by said party, as required by law," the charge is sufficiently explicit to sustain a contest upon the ground of abandonment and failure to reside.

The leave of absence granted by the local officers for a period of one year, commencing November 14, 1890, cannot protect him in this case, for the reason that the claimant made homestead entry for the land, as the record shows, on July 16, 1888, and when the leave was granted had already failed to comply with the law.

This brings the case up on its merits, and an examination of the evidence discloses that the entryman did not establish residence upon the land, due, as he alleges, to the serious illness of his wife. This is no valid excuse for failure to comply with the law. The holdings of this Department have been lenient to avoid applying harsh rules to entrymen, where they have actually established residence, and have been prevented by circumstances from maintaining a continuous residence upon the land, but in no case has it been held that the reasons here urged were sufficient to excuse the establishment of residence. That is an absolute necessity, and having failed to do so, it follows

that the contest must be sustained, and the homestead entry of Paugh canceled.

Your office decision of June 11, 1892, is hereby affirmed.

RAILROAD LANDS—SETTLEMENT RIGHTS.

O'LEARY *v.* SMITH.

The use of a tract for grazing purposes, in connection with adjacent land upon which the applicant resides, does not give him the preferred right to purchase said tract as a settler under section 3, act of September 29, 1890.

First Assistant Secretary Sims to the Commissioner of the General Land Office, December 16, 1893.

This case involves the SW. $\frac{1}{4}$, Sec. 1, T. 3 S., R. 17 E., W. M., The Dalles, Oregon. Said tract was formerly a part of the grant to the Northern-Pacific Railroad Company and was forfeited by the act of September 29, 1890 (26 Stat., 496).

On April 5, 1891, Smith made homestead entry for the land. On the 13th of the same month O'Leary filed his affidavit of contest against said entry, alleging a better right thereto by reason of prior occupation and improvement. Thereupon a hearing, at which the parties appeared with counsel, was had before the register and receiver June 10, 1891.

From the evidence adduced the local officers found that the land "has never been actually and bona fide settled upon by any of the parties at any time;" that it had been embraced in the homestead entry of one Sill, which was canceled by relinquishment in November, 1890, and that Smith's entry having been made after that date, should not be canceled.

O'Leary appealed from this ruling, whereupon your office, by its decision dated May 24, 1892, found that he had acquired no rights under the act of 1890, *supra*, and affirmed the ruling below.

O'Leary appeals here.

The appellant's case proceeds upon the theory that his acts in connection with the land were such as to give him a preferred right under that part of section 3, of the act of September 29, 1890, *supra*, which gives to certain persons who have "settled" upon lands forfeited by said act "with *bona fide* intent to secure title thereto by purchase from the State or corporation when earned by compliance with the conditions or requirements of the granting acts of Congress," a preferred right to purchase in accordance with the terms of the act.

The testimony, while somewhat unsatisfactory, sustains the finding of your office to the effect that O'Leary merely used the land in connection with an adjoining tract (whereon it seems he lived), mainly for grazing purposes, and that he was not a settler thereon within the meaning of the act referred to. See *Brown v. Hinkle* (15 L. D., 168).

I accordingly concur in the conclusion reached by the local and your office, to the effect that no reason is shown for disturbing the *prima facie* valid entry of Smith.

The decision appealed from is affirmed.

OKLAHOMA LANDS—COMMUTATION.

JAMES H. HENRY.

The commutation of a homestead entry under section 2301 R. S., does not disqualify the entryman as a subsequent homestead claimant for Oklahoma land lying within the Cheyenne and Arapahoe reservation, and acquired by cession from the Creek or Muscogee Indians.

** First Assistant Secretary Sims to the Commissioner of the General Land Office, December 16, 1893:*

This case involves the NE. $\frac{1}{4}$ of Sec. 35, T. 17 N., R. 8 W., Kingfisher land district, Oklahoma Territory.

The record shows that on November 8, 1890, Anson C. Hartman made homestead entry for the NW. $\frac{1}{4}$, Sec. 32, T. 17 N., R. 6 W., which was canceled by relinquishment April 18, 1891.

May 19, 1892, Hartman filed an application for a restoration of his homestead right and that he be allowed to enter the land involved.

April 22, 1892, James H. Henry made application to enter, under the homestead laws, the same tract. This application was refused by the local officers for the reason of its conflict with that of Hartman. No appeal was taken by Henry but on May 21, 1892, he filed a protest against the acceptance of Hartman's application, claiming prior settlement upon the land. Subsequently, he filed an affidavit which set forth that he had on December 23, 1886, made homestead entry for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 8, and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 17, T. 35 S., R. 32 W., Garden City land district, Kansas, and that he had commuted the same under section 2301 R. S., July 10, 1888. Patent was issued March 15, 1890.

The application of Hartman in your office was rejected September 7, 1892, and Henry was held to be disqualified to make entry on the ground of his entry of land under the homestead laws at Garden City, Kansas. The land involved was a part of the Cheyenne and Arrapahoe reservations.

From this decision Henry appealed to the Department, alleging error in law, in holding that his commuted entry operated as a disqualification to enter the land in question. In relation to the lands purchased from the Seminole Indians, section 13 of the act of March 2, 1889 (25 Stat., 1004-1006), provides—

That the lands acquired by conveyance from the Seminole Indians hereunder, except the sixteenth and thirty-sixth sections shall be disposed of to actual settlers

under the homestead laws only, except as herein otherwise provided (except that section two thousand three hundred and one of the Revised Statutes shall not apply): *And provided further*, That any person who having attempted to, but for any cause failed to secure a title in fee to a homestead under existing law, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make a homestead entry upon said lands,

and the last clause of said section further provides—

That all the foregoing provisions with reference to lands to be acquired from the Seminole Indians including the provisions pertaining to forfeiture shall apply to and regulate the disposal of the lands acquired from the Muscogee or Creek Indians by articles of cession and agreement made and concluded at the city of Washington on the nineteenth day of January in the year of our Lord eighteen hundred and eighty-nine.

This Department in passing upon the question now at issue held in the case of John Waner (15 L. D., 356), that

the right to make a homestead entry of Oklahoma lands conferred by section 13, act of March 2, 1889, upon persons who had previously made homestead entry and commuted the same, is extended by section 18, act of May 2, 1890, to Pottawatomie lands that were a part of the original Seminole purchase.

In the case of James M. Clark (17 L. D., 46), it was held that an entry had to be commuted under section 2301 R. S., in order to permit the entryman to acquire title, under the homestead laws, to additional land.

In the recent case of James W. Shearing (17 L. D., 118), the case of John Waner, *supra*, was cited and the Department held that the same rule applied to lands purchased from the Muscogee or Creek Indians. Said case of James W. Shearing, *supra*, is directly in point, and while the land sought to be entered by Henry was not a portion of the Arrapahoe and Cheyenne reservation lying within the Seminole lands, it was within that portion of the reservations that lay within the Creek or Muscogee lands, and, under the statutes and decisions of the Department cited, it is evident that his commuted entry under section 2301 R. S., did not disqualify him from entering the land his application covered. It therefore follows that the decision appealed from was in error and the same is hereby reversed. Henry will be allowed to make entry for the land upon complying with the requirements of the law.

PRACTICE—RAILROAD GRANT—MINERAL LAND.

NORTHERN PACIFIC R. R. CO. v. MARSHALL ET AL.

In forwarding a case on appeal to the Department all papers in connection with the entry should be transmitted therewith.

When a legal mineral location has been made on land returned as agricultural the slight presumption in favor of the return is overcome, and the burden of proof shifts to the party attacking the mineral claim.

Mineral land is excluded from the grant to the Northern Pacific railroad company.

*Secretary Smith to the Commissioner of the General Land Office,
December 19, 1893.*

The land involved in this appeal is the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 11, T. 10 N., R. 1 W., Helena, Montana, land district, and is within the granted limits of the grant to the Northern Pacific Railroad Company by act of July 2, 1864 (13 Stat., 365), which became effective on filing map of definite route July 6, 1882. The tract was returned as agricultural by the surveyor-general, and was applied for by said company March 10, 1887, and the same was rejected by the local officers, but no reason therefor is given. From this rejection the company appealed.

The application of Samuel Marshall *et al.* is not before me, but it is stated by your office letter that they "filed mineral application No. 890" for said tract March 15, 1881, and it was probably by reason of this fact that the company's application for the land was rejected.

By letter of August 30, 1890, your office ordered a hearing to determine the character of the land. "At the hearing the mineral claimants failed to appear, and upon motion of the company's counsel the default was entered." The local officers "recommended the cancellation of the mineral application," because no testimony had been submitted, and forwarded the record to your office, where, after a consideration of the same, the findings of the local officers was set aside, and a new hearing ordered

to determine the *present* character of the land, for the reason that the mineral claimants were not obliged to prove affirmatively the character of the lands embraced in their application, and in the absence of proof to the contrary the presumption is that the lands are mineral.

A hearing was again ordered for May 6, 1892, at which both parties appeared. The company refused to submit any testimony, but filed its protest against the mineral application. The defendant took the testimony of one witness. The register and receiver recommended "that the company's application to select should be rejected and mineral application No. 890 be held intact," and on appeal your office, by letter of August 26, 1892, affirmed their judgment, whereupon the railroad company prosecutes this appeal, specifying as error, (1) to rule that the burden of proof was on the company; (2) to have ruled upon the character of the land as shown by the evidence; (3) not to have

ruled that the burden of proof was on the mineral claimants; and (4) not to have rejected the claim of Marshall *et al.* and not to have awarded the land to the company.

As before stated, the original application for the mineral entry, and all the papers required by the rules to be presented in order to procure patent are not in the files, and informal inquiry in your office develops the fact that they never have been sent up from the local office. This practice should not be permitted. All the papers in connection with a given entry, especially in applications for patent for mineral lands, should always accompany the appeal.

If it were necessary in the determination of this case to ascertain when the location of the placer claim was made, or the reason why entry was not made after the application, or whether entry was in fact made or not, it would be impossible to do so from the record before me. You will therefore direct that in all cases all papers in connection with any entry shall be forwarded to the Department with all appeals.

It will be presumed that the locators complied with the law and made a discovery of mineral prior to location. It follows, therefore, that the land was accepted from the grant (Central Pacific Railroad Company *et al.* v. Valentine, 11 L. D., 238), unless it was shown by the company that the land was not mineral in character, and the burden of proof to establish this fact was rightfully placed upon the railroad company.

It is true that the surveyor-general's return shows the land to be agricultural in character. The presumption arising from the return of the surveyor-general is necessarily a slight one. This question was discussed in all its details in the recent case of Winscott v. Northern Pacific R. R. Co. (17 L. D., 274), where, in concluding the discussion—on page 276—it is said—

So that the report of the surveyor must necessarily constitute but a small element of consideration, when the question is as to the true character of the land.

In the location of a mineral claim, placer or lode, the first requirement of the law is a discovery (Secs. 2329 and 2320, Revised Statutes). All rights inuring to the benefit of the locators are based upon this initial act. (Erhardt v. Boaro, 113 U. S., 537; United States v. Iron Silver Mining Co. 128 Id., 673—O'Reilly v. Campbell 116 Id., 418.) When, therefore, a legal location has been made on land returned as agricultural, the slight presumption in favor of the return of the surveyor-general is, *ipso facto*, overcome, and the burden of proof shifts to the party attacking such mineral entry. By such discovery and location it is demonstrated that the return was erroneous, and it would be trifling with physical facts to put the *onus* on the locator to present further evidence until it is shown that, as a matter of fact, he had no discovery.

Your judgment is therefore affirmed.

PRE-EMPTION CLAIM—TRANSMUTATION.

AMES *v.* BALES.

The right of a pre-emptor to transmute his claim is not necessarily defeated by failure to take such action until after the expiration of the statutory life of the filing, and the intervention of an adverse claim based on an entry made within the life of the filing and with a full knowledge of all the facts.

First Assistant Secretary Sims to the Commissioner of the General Land Office, December 19, 1893.

On the 3d of December, 1888, John P. Ames filed his pre-emption declaratory statement for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and lot 1 of Sec. 18, T. 25 N., R. 7 E., Seattle land district, Washington, alleging settlement on the 30th of October of the same year.

On the 30th of July, 1891, William P. Bales made homestead entry for the same tract.

On the 3d of August, 1891, Ames presented his application to make homestead entry for the tract, and also filed a sworn protest against the homestead entry of Bales, alleging that he was the prior settler on the land, having made actual settlement thereon October 30, 1888; that he had continuously resided there since the date of such settlement; that he had improvements on said land to the value of about \$300; that he had fully intended to transmute his said filing into a homestead entry, but by reason of sickness was prevented from doing so before the expiration thereof; and that the said Bales, being fully conversant with the facts in the case, took advantage of his sickness, and made homestead entry for the tract. He asked that a hearing be appointed to determine the respective rights of the parties.

Such hearing was ordered, and resulted in a decision by the local officers on the 21st of December, 1891, in favor of Ames, they recommending that the homestead entry of Bales be canceled. The decision of the local officers was affirmed by your office on the 8th of August, 1892, and allowed the entry of Bales to stand for sixty days, subject to the preference right of entry for that time granted to Ames, and provided that if Ames exercised such right within that time, the entry of Bales would be then canceled. An appeal from said decision brings the case to the Department.

The facts established by the evidence at the hearing were, that Ames made settlement upon the land on the 30th of October, 1888; that the first house that he erected was found to be just over the line from the land; that he thereupon erected another house, placing it upon the land; that both these houses were destroyed by fire in August, 1889; that he afterwards erected a third house, completing it in the fall of 1889; that he continued to reside in this third house, working out a portion of the time; that he was a single man, and upon being

taken sick, in the latter part of July, 1891, he went to his father's house for care and nursing; he was there confined, either to the house or bed, from July 26, to August 3, 1891, on which latter date he went to the land office to transmute his pre-emption filing into a homestead entry. It was also shown that Bales had worked both for Ames and his father, and was aware of the date upon which the pre-emption filing of Ames would expire, having seen the pre-emption paper which stated that it would expire July 30, 1891. Being unable to go to the land office on that day, on account of sickness, Ames sent his father, to inform the local officers that he intended to transmute his pre-emption filing into a homestead entry, as soon as he was able to travel.

Bales offered no evidence at the hearing, relying upon sections 2265, 2267 and 2289 of the Revised Statutes, and in his appeal he asks that they be strictly construed.

Section 2265 provides that every claimant under the pre-emption law, must make known his claim in writing, to the register of the proper land office within three months from the time of his settlement, or his claim will be forfeited and the tract awarded to the next settler, in the order of time, on the same tract, who gives such notice and complies with the law.

Section 2267 provides that all claimants of pre-emption rights, shall make the proper proof and payment for the land claimed, within thirty months after the date prescribed for filing their declaratory notices has expired.

Section 2289 provides that the persons therein enumerated, shall be entitled to enter under the homestead law, one hundred and sixty acres of unappropriated public lands, upon which they may have filed a pre-emption claim, or which at the time the application is made, is subject to pre-emption.

Three months after Ames made settlement upon the land in question, expired with the 30th of January, 1889. Within that time he made known his claim in writing, as required by section 2265 of the Statutes.

Thirty months after the 30th of January, 1889, expired with the 30th of July, 1891. Until the expiration of that day the land covered by the pre-emption filing of Ames was not "unappropriated public land." Whatever entry, therefore, Bales made for the land, on or before the 30th of July, 1891, was subject to the rights of Ames, as a prior settler thereon.

The good faith of Ames, in all his connection with the land, is abundantly established. In his settlement, improvements, and residence thereon, he fully complied with the law. Being unable to make proof and payment for the land, as required by the pre-emption law, he determined to transmute his filing into a homestead entry, and so secure title. This fact was known to Bales, as was also the fact of the sickness of Ames, at the time when the change in the character of his claim to the land should be made. Bales took advantage of his know-

ledge, and sought to deprive Ames of his improvements upon, and of his rights to the land. The entry of Bales, however, was made while the land was covered by the filing of Ames, and while he was living thereon under his pre-emption claim.

I find no reported case, decided by the Department, on all fours with the case at bar. That of Hugh Taylor, (9 L. D., 305), presents questions somewhat similar. In that case Taylor had made proof, but owing to sickness and poverty was unable to make payment. Finding himself in that situation, he applied to transmute. After the time for making proof and payment had expired, but before he applied to transmute, Roberts, with full knowledge of all the facts, made homestead entry for the land. In his application to transmute, Taylor set forth all the facts at length, and asked for a hearing to determine the rights of the parties. In denying his application to transmute, and for a hearing, your office said:

A homestead entry has, since the date of expiration, attached to the tract. Taylor is, therefore, debarred by it, from the transmutation desired. The ordering of a hearing would, in view hereof, avail him nothing, and his application is denied.

The Department overruled said decision, and directed that a hearing be ordered in the case. The syllabus to said departmental decision is as follows:

The right of transmutation, after the statutory life of the filing has expired, is not defeated by an intervening homestead entry, made during the pendency of final proof proceedings on the part of the pre-emptor, and with full knowledge of his existing *bona fide* relation to the land.

In the course of his decision in that case, the Acting Secretary said:

Taylor having on file an uncanceled pre-emption filing; he and his family having all along continued to make the tract their actual and only home and place of residence; . . . and, finally, Roberts the so-called "adverse" claimant, having had full knowledge of these facts when he undertook to make his entry of the tract, that entry was irregularly allowed, and is in law no bar to the transmutation asked for by Taylor. The privilege of transmutation granted by section 2289 of the Revised Statutes to one who "may have filed" a pre-emption claim, must, I think, be held to continue available accordingly, at least, until the "pre-emption claim" has been legally extinguished by a final determination to that effect, though, of course, the transmutation must be made subject to the rights, if any, of either *prior* adverse claimants or successful contestants of the "pre-emption claim" itself. The statute itself does not attach to a failure to transmute before the expiration of the pre-emption period, any such penalty as instant and necessary forfeiture of the right of transmutation, for the benefit of any other applicant to make entry, who must be preferred in any event and wholly irrespective of the equities of the case.

That case also held that the statute not having made a mere subsequent applicant a beneficiary who is to profit by the pre-emption claimant's failure to transmute in time, this Department is not bound for the former's benefit, to declare finally forfeited the claim of one whose relations to the land have never been abandoned, but on the contrary, have been close and meritorious.

In the case at bar, the homestead entry of Bales was made before the pre-emption filing of Ames had expired, and while it was in full force

and effect. It has never since "been legally extinguished by a final determination to that effect," but all decisions yet rendered in the case, have been in favor of the rights of Ames.

In view of the fact that there are no express statutory provisions prohibiting the transmutation of a pre-emption claim, after the statutory life of the filing has expired, while steps looking to a transmutation have been taken before the filing expired, as in this case, and the rulings of the Department in the cases cited, and of the equities of this case as established by the evidence submitted at the hearing, I think the conclusion reached by your office was correct, and the decision appealed from is accordingly affirmed.

MINING CLAIM—PLACER LOCATION.

CLARK ET AL. *v.* ERVIN.

(On Review.)

A placer location of land for building stone, that fails because unwarranted under the law when made, can not be validated by a subsequent discovery of some other material that is subject to entry under the placer law.

Secretary Smith to the Commissioner of the General Land Office, December 19, 1893.

I have considered the motions for review of departmental decision of February 13, 1893, and for a rehearing filed by counsel for M. S. K. Clark and William Elmendorf, in a case wherein they are protestants and Robert N. Ervin is defendant. (16 L. D., 122.)

An examination of the motions and affidavits pro and con, rendered it necessary for me to examine the entire record in the case, and as a result I find that Clark and Elmendorf and six others, on May 27, 1889, located as placer mining ground, the NE. $\frac{1}{4}$ of Sec. 14, T. 1 N., R. 7 E., B. H. M., Rapid City, South Dakota, land district. The "notice of location," concludes thus: "This claim shall be known as the Stone Placer Claim; and we intend to work the same in accordance with the laws of the United States." Subsequently, on November 13, 1889, Ervin filed his pre-emption declaratory statement for said tract, alleging settlement November 12, 1889, and after publication notice offered final proof before the local officers June 14, 1890, when Clark and Elmendorf filed a verified protest alleging their prior location and title to the premises in themselves; also that the land "is wholly worthless for agricultural purposes, being entirely covered and underlaid with stone deposits, and cut by deep ravines;" and that no portion of the premises can be cultivated; that on May 27, 1889, said land was vacant and unappropriated public land, and by virtue of the

mining laws of the United States they and their associates located the same;

That said land is wholly covered and underlaid with an immense deposit of good building stone, flag stone and fire clay. The stone consisting of white and yellow sand stone, in four bedded horizontal deposits of an average width of four feet each, underlying the whole quarter section, and the fire clay occupies the same position between the sand stone of an average width of ten feet, that said land is in each and every subdivision thereof more valuable for mineral than agricultural purposes.

That Ervin knew of the location and the rights of the several locators at the time of his pre-emption filing. The prayer of the protestants is that the final proof may be rejected; that the land declared more valuable for mineral than agricultural purposes and that the claim of the protestants "be found and declared to be prior and superior to the pre-emption claim."

By stipulation a hearing was had before the local officers and as a result they decided that the tract was "only valuable for its stone," rejected the final proof and recommended the cancellation of Ervin's filing. On appeal, your office on November 19, 1890, affirmed their decision, but defined the issue to be "that the ground is mineral in character, being only valuable for stone quarrying purposes." In that decision it is said that the land is shown by the witnesses for the protestants to be of value "for its deposits of stone and fire clay." On appeal the Department reversed said decision on the ground that there was "no law allowing land chiefly valuable for common building stone to be entered under the placer law prior to August 4, 1892," following the decision of *Conlin v. Kelly* (12 L. D., 1). A review of this judgment is now asked, on the ground of "insufficiency of the evidence to justify the decision in the following particulars," and then follows the several points which plaintiffs claim are erroneous. The only material one in my opinion is the charge that the testimony shows the presence of fire-clay upon the land and the decision does not refer to this at all in considering its mineral character.

The issues made by the protest were that the land was mineral in its character and subject to placer entry because it contained

good building stone, flag stone and fire clay, and if the evidence supports the charges the parties to the action, undoubtedly, have the right to demand the consideration of all the material issues involved affecting their rights. If therefore it is shown by the record that there was sufficient evidence to establish the presence in any appreciable quantity of fire-clay, then it was error not to have considered it, provided the placer had been located for the fire-clay deposit, because it has been held by the Department that land containing fire clay or kaolin may be taken up under the law relating to placer mines. (*Dobbs Placer Mine*, 1 L. D., 565.)

The decision of my predecessor in the case at bar should be affirmed upon the only question of law that is therein considered; that is that there was no law in existence at the time this claim was located authorizing the entry of land valuable for common building stone as a placer mine. From a careful examination of the record, I am satisfied that

the conclusion reached is in accordance with the evidence upon this point.

The question therefore to be considered is whether this location may be sustained by reason of the existence of fire clay. I do not think it will be seriously contended that if the location made for the building stone fails because unwarranted in law, the locators or their assigns can be permitted to claim a valid location upon the subsequent discovery of some material that is subject to entry under the placer law. In other words if the locators now insist upon the validity of their location by reason of fire clay they must show that the location was made for that purpose and none other. The placer mining law was not intended to be a catch-all system of taking public lands, allowing parties to play fast and loose to suit their own caprice. By Sec. 2329 (Revised Statutes) it is provided that placer claims "shall be subject to entry and patent and upon similar proceedings, as are provided for vein or lode claims" and the essential requirement of the statute (Sec. 2320 R. S.) in the location of a lode claim is the discovery of mineral; "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located."

Now the evidence of those of the original locators who testified must be the guide as to their intentions. The "notice of location" is entirely silent as to the character of the material the locators intend to claim. It simply declares that they locate under the Revised Statutes "the following described placer mining ground." Mr. Clark says the first work he did was to take out building stone. This seems to have been done prior to January, 1890. This is all of his direct testimony as to work done, but in estimating the value of the land he puts it entirely on the basis of the stone it contains. Mr. Elmendorf says he worked some in the quarry and some on the road; that the land is not worth anything for agricultural purposes, but \$50 per acre for building stone; he thinks stone could be quarried on all of it. He tells of the out-cropping of the stone in the gulches. Falconer says there was sand rock exposed in the ravines that he calls good building rock. He can not tell how much of the land is underlaid with it or how thick the ledges are; he would not give as much for it for agricultural purposes as for the stone on it. Vallette says there are out-croppings of sand stone in the gulches about four feet thick; thinks nearly all of it is underlaid with this sand stone and that it is more valuable for the stone than for agriculture. This is the testimony of those who were locators of the claim upon the stone. In addition I might add that it is quite apparent that the attorneys conducting the examination relied entirely upon the stone and their questions are as to its value as a stone placer claim not as "The Stone Placer Claim."

Now as to the fire-clay and flag stone; Clark says there is fire clay in the south-east part and it crops out in the gulches; it measured ten feet through where it had been exposed by digging for coal, sometime

during the winter. I take it that the witness means the *past* winter, which would have been subsequent to his location and Ervin's pre-emption filing. Elmendorf says there is some stone that he has been told was flag stone. He does not know anything about fire clay, "but there is a rock in one of these ravines that is called fire clay." Smith does not know of his own knowledge anything about flag stone but saw something that was said to be flag stone; he is not positive about the fire clay "there is a clay there that is said to be fire clay." Violin says: "I have seen a lot of flag stone on this place," and have seen some fire clay. Holesclaw says: "I saw some very nice flag stone there;" "I don't know anything about fire-clay." Scribner saw flag stone three or four feet in depth, and "saw something that was pointed out to me and said to be fire clay." Falconer, one of the locators, says "I have seen fire clay there." Smith says: "I have been told it was flag stone;" that he saw, but don't know its thickness; "Did you ever see any fire clay out there? Yes sir; I have." Tighe says he noticed a rock that looked like flag stone and thinks he saw fire clay. McGee says there is a deposit of flag stone, but did not notice any fire clay. This is all the testimony there is upon the fire clay deposit. The most of the witnesses had made their examinations just prior to the hearing, which was held in May, 1893.

It will be observed that none of them claim the location to have been made upon the discovery of fire clay; that they do not give the extent or quality of the deposit or claim that it is of any value whatever. Even the date of its discovery is not given. In fact I am impressed with the idea that this matter was a mere incident to the trial, as the testimony I have quoted above would indicate. In some instances the language is given in full outside of the question propounded by counsel and in others the full substance is reported. The testimony is quite voluminous, there being about one hundred and fifty pages of type-written matter, and the entire burden of it, aside from the quotations above, is devoted to the stone industry.

I therefore can not escape the conclusion that this placer location was made for the building stone it contained and the fire clay deposit is an after-thought upon the part of the protestants. If there was any doubt as to this conclusion from the testimony, I think it would be confirmed by the motion for a rehearing and the affidavits filed in support thereof. This motion is made upon the ground of newly discovered evidence "which could not with reasonable diligence have (been) discovered and produced at the trial." This newly discovered evidence is "that the annual assessment work for the years 1891 and 1892 caused to be done by the mineral protestants herein, exposed to view in all such places where the work has been performed deposits of fire-clay underlying the strata of sand stone. Hence in view of the fact that the mineral location must fail because the ground was not subject to entry for its building stone, and as the discovery and location was not made upon the alleged deposit of fire-clay the motions must be overruled.

I might add that the showing made on the motion for rehearing would not be sufficient in any event to warrant such an order. A motion for a rehearing will not be granted where the newly discovered evidence is such as ought to have been known before the trial, and no good excuse is shown for not procuring it. (*Kelly v. Moran*, 9 L. D., 581). But aside from this, counter-affidavits have been filed by the defendant by which it is shown that there has not been discovered any fire clay on the land nor any work done for that purpose, but whatever work and discoveries ^{were} ~~that~~ have been done and made ~~was~~ upon other and different land.

The motions are therefore denied.

RAILROAD GRANT—INDIAN RESERVATION.

ATLANTIC AND PACIFIC R. R. CO. *v.* WILLARD.

Lands embraced within the Camp Verde Indian reservation at the date of the definite location of the road are excepted thereby from the operation of the grant, and the subsequent release of said lands from such reservation will not inure to the benefit of the grant.

*Secretary Smith to the Commissioner of the General Land Office,
December 19, 1893.*

On November 20, 1884, Lewis A. Willard made homestead entry (No. 334) of the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 1, and the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 12, T. 15 N., R. 3 E., at Prescott land office, Arizona.

On December 28, 1889, he made final proof and received final certificate (No. 187) thereon.

The papers in the case were transmitted to your office, and were held satisfactory by your office letter of July 28, 1890, to the local officers, and said entry was held for approval for patent subject to the right of appeal by the Atlantic and Pacific Railroad Company.

Said company, contending that said land was included within its grant, appealed from your decision to this Department. The following errors are assigned:

First:—In holding said land excepted from the grant by reason of its inclusion within the limits of the Camp Verde Indian reservation, made by executive order of October 3, 1871.

Second:—In holding impliedly that said reservation was ever used for the purpose set forth in executive order of October 3, 1871.

Third:—In not holding that said Camp Verde Indian reservation, if legally made, only passed a temporary use which could not and did not prevent the grant from attaching subject to such use.

Fourth:—In holding that said reservation could have any possible effect upon the

grant, the same having been made after Congress had passed the act for the benefit of the Atlantic and Pacific Railroad Company.

This land is included within the primary limits of lands granted to said company by section third of the act of July 27, 1866 (14 Stat., 292), which grants the odd-numbered sections,—

to the amount of twenty alternate sections per mile, on each side of said railroad line, . . . and whenever on the line thereof, the United States have full title, *not reserved*, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office.

The map of definite location of said road, opposite to said tract, was filed March 12, 1872.

At that date the land in question was included within the Camp Verde Indian reservation, and for that reason your office decision held it to be excepted from the operation of said grant.

The company urge that the alleged reservation was not created by executive order, and was therefore not such a reservation as served to defeat its grant, and even if properly created, that it did not defeat the grant, the rights under which attached subject to its use, and upon the extinguishment of the reservation its title became complete.

It has been too well established by the decisions of this Department and the courts, to require further discussion, that if a tract is found to be reserved at the date of the attachment of rights under a railroad grant, it is thereby excepted from the operation of such grant, and the subsequent relinquishment of the reservation will not cause rights to attach thereunder. See *Dellone v. Northern Pacific R. R. Co.* (16 L. D., 229).

It will therefore be necessary to determine whether the Camp Verde reservation was properly created in order to determine its effect upon the grant.

In the argument filed by counsel for the company, the following history is given of the creation of this reservation and the cause that led thereto, and the reasoning depended upon to show that in fact no reservation was ever created by proper authority.

In the latter part of 1870 and early part of 1871, the warlike Apache Indians in Arizona and New Mexico went upon the war-path and in subduing them the military and whites were reported as having killed many peaceably inclined Indians. It was also suggested that there were many Apaches who would be friendly to the whites if given an opportunity. With a view of ascertaining the exact situation of affairs, the Secretary of the Interior detailed Mr. Vincent Colyer, then Secretary of the Board of Indian Commissioners, to journey into that country and report. His instructions were contained in letter of July 21, 1871, from the Secretary of the Interior, which reads as follows:

'You are hereby authorized and requested to proceed to New Mexico and Arizona Territories, and there take such action as in your judgment may be deemed wisest and most proper for locating the nomadic tribes of these territories upon suitable reservations; bringing them under the control of the proper officers of the Indian

Department, and supplying them with necessary subsistence and clothing and what ever else may be needed.

The Department invests you with full power to exercise according to your discretion in carrying into effect its views in relation to the Indians referred to, and I have to request that you will from time to time report to the Secretary of the Interior your action and progress and result of your investigations.'

These instructions were based upon a communication to Secretary Delano dated July 13, 1871, which reads:—

'Mr. Colyer, Secretary of the Board of Indian Peace Commissioners, has told me of the report of Supt. Pope to the effect that with enlarged powers and assurances of protection and proper provisions, the wild Indians of Arizona and New Mexico may now be induced to come into Canada Alamosa. I suggest that enlarged powers be given to Supt. Pope to effect so desirable an object, or that Mr. Colyer be sent with all the necessary powers.'

It will be readily seen from this correspondence that the object of Mr. Colyer's journey was for the sole purpose of bringing the wild Apache Indians into close relations with the government. He was at first only authorized to bring them into Canada Alamosa, but subsequently to such other places as were convenient. Wherever they were gathered, however, it was for the sole purpose of protecting them and furnishing food and clothing. So long as they remained where Colyer placed them, the War Department was empowered and instructed to guard them from attacking whites. There was however absolutely nothing that amounted to a "reservation" of lands. There was no treaty with these Indians; the government assumed no other obligations than those of issuing clothes and food, and there was no authority existing in Mr. Colyer for his action of October 3, 1871. This letter of Mr. Colyer to Major General Grover in command of Camp Verde is the "executive order" referred to by the Commissioner as creating a "reservation" sufficient to defeat the railroad grant. This "executive order" is as follows:

'General: Having personally inspected the country and the condition of the Apache Indians on the Verde River above this post, and finding the Indians to be in considerable numbers sick, destitute and in a starving condition; having no boundaries defining their home; their country over-run by hunters who kill their game and not unfrequently kill the Indians,—gold prospectors and others, none of whom locate in this section of the country,—agreeably to the powers conferred upon me by the President and communicated to me in the letter of the Secretary of the Interior dated July 31, 1871, and the orders of the Secretary of War of July 18 and 31, 1871, and in harmony with the humane action of Congress in providing funds for this purpose, I have concluded to declare all that portion of country adjoining on the north-west side of and above the military reservation of this post, on the Verde River, for a distance of ten miles on both sides of the river to the point where the old wagon road to New Mexico crosses the Verde, supposed to be a distance up the river of about forty-five miles, to be an Indian Reservation within the limits of which all peaceably disposed Apache Mohave Indians are to be protected, fed and otherwise cared for, and the laws of Congress and executive orders relating to the government of Indian reservations shall have full power and force within the boundaries of same unless otherwise ordered by Congress or the President.'

Upon this personal letter to General Grover, has been placed the burden of carrying a reservation of the land sufficient to defeat a grant made five years prior by the Congress of the United States. The only sense in which the word "reservation" was or could be properly used was for the guidance of the military, enabling them to know what Indians and where found were to receive rations and clothing. It is absurd to say that this private letter written for the information of a general in charge of a camp by a subordinate government official amounts to an "executive order" creating a permanent reservation. No such object was sought to be attained and in every instance where permanent reservations have been created, special orders from the President have issued specifically ordering the same.

See Executive Orders relating to Indian^{*} Reservations.

Colorado River Reserve, Page 4.

Gila Bend Reserve, " 5.

Hualpai Reserve, " 5.

Moqui Reserve, " 6.

Papago Reserve, " 6.

Prina & Maricope Reserve, " 8.

Suppai Reserve, " 8.

All in Arizona.

Mr. Colyer in his letter of November 7, 1871, to Secretary Delano, reported the various "reservations" selected by him and on the same day the Secretary referred all papers to the President with the statements:—"I have the honor to transmit herewith copy of a communication addressed to this Department by Hon. Vincent Colyer, one of the Board of Indian Peace Commissioners, who recently visited Arizona wherein he states his views in relation to the Apache Indians and describes certain tracts of country in Arizona and New Mexico which he has selected to be set apart as reservations for their use, as authorized to do by orders issued to him before visiting the Apaches.

I have the honor to recommend in pursuance of the understanding arrived at in our conversation with the Secretary of War on the sixth instant, that the President issue an order authorizing said tracts of country described in Mr. Colyer's letter to be regarded as reservations for the settlement of Indians until it is otherwise ordered."

This language does not convey the idea that Mr. Colyer's letter of October 3, 1871, was an "executive order" within the Secretary's idea, and we suggest that this communication of the Secretary recommending the reservation completely negatives such an assumption. It was, consequently error upon the Commissioner's part in holding that the letter of October 3, 1871, created a reservation. It did not and could not, as is fully demonstrated by the later correspondence on the subject. Although suggestions of Mr. Colyer as to other reservations were carried out and "executive orders" duly issued to that effect, none was ever issued as to lands lying along the Camp Verde river and for the manifest reason that the military post at that point was sufficiently large to accommodate all the Indians who cared to place themselves under the government's charge.

For the reasons given we maintain that there never was a reservation of these lands by competent authority, sufficient to except the same from the operation of the grant.

In this history one important fact is overlooked, viz., the indorsement upon Mr. Secretary Delano's letter of November 7, 1871, addressed to the President in which he recommended the reservation of the tracts described in Mr. Colyer's letter.

This endorsement is as follows:

EXECUTIVE MANSION,
Washington, D. C., Nov. 9, '71.

Respectfully referred to the Secretary of War who will take such action as may be necessary to carry out the recommendations of the Secretary of the Interior.

U. S. GRANT.

It was by this approval that the reservation was created, and while the Commissioner erred in holding that the reservation was created by the order of October 31, 1871, yet this mistake in nowise affects the company as the President's approval antedated the filing of the map of definite location by more than four months. This reservation con-

tinued in force and effect until April 23, 1875, when President Grant issued an order that—

all orders establishing and setting apart Camp Verde Indian reservation in the Territory of Arizona, described as follows are hereby revoked and annulled, and the said described tract of country is hereby restored to the public domain.

In this connection I note that the company's appeal in this case puts it in a peculiar light.

The records of your office show that this company has pending a list of selections covering several hundred thousand acres, in which the bases assigned as lost to the grant are the lands within the Camp Verde Indian reservation.

In making such selection it admits that these lands were lost to the grant, and yet as against a claimant for one forty acre tract thereof, it maintains that the lands within the Camp Verde Indian reservation were not excepted from the grant but passed thereunder.

Further comment upon these facts is unnecessary. The land embraced in the Camp Verde reservation having been in a state of reservation at the date of the definite location of said road was thereby excepted from its grant and your decision holding for approval Willard's homestead entry is affirmed.

MORRISON *v.* DAVIDSON.

Motion for review of departmental decision of April 15, 1893, 16 L. D., 378, denied by Secretary Smith, December 19, 1893.

MINING CLAIM—NOTICE OF APPLICATION.

* * BRETELL *v.* SWIFT.

(On Review.)

Notice of mineral application to one of the owners of a conflicting claim is notice to his co-owner, in the absence of fraud.

In the selection of a newspaper for the publication of notice of mineral application the register, in the exercise of a proper discretion, may designate a paper that he regards best for the purpose of giving the greatest publicity to the notice, even although it may not be the paper nearest to the land.

Secretary Smith to the Commissioner of the General Land Office, December 19, 1893.

I have considered the motion filed by counsel for George E. Bretell for a review of departmental decision of February 21, 1893 (16 L. D., 178). The case was certified to the Department, in accordance with departmental decision of June 28, 1892 (Bretell *v.* Swift, 14 L. D., 697).

It will be observed, by reference to the last citation, that Swift made entry of the Sulphur Lode on May 16, 1891, after having published his notice for the required length of time in the Deadwood Weekly Pioneer,

the last publication being May 14, 1891. No adverse claim was filed, but on May 15, 1891, Bretell filed a verified protest against the issue of the patent, alleging that he was one of the owners of Rochester Extension lode, a part of which was included in said mineral entry; that the Sulphur Lode is situated within 2,000 feet of the incorporated limits of Lead City, where two daily papers are published, and that Deadwood, where the Pioneer is published, is more than two and one-half miles from the Sulphur Lode; that—

owing to the sickness of his father and sister he was obliged again to go east to Rochester, New York, and fearing that the parties who had located the Sulphur Lode intended to apply for a patent he instructed the men in his employ whom he left at work upon and in charge of the property to keep track of the Lead City papers and inform him at once if an application for patent of the "Superior" Lode was published therein so that he might have a survey made and file an adverse claim.

He also had the Daily Tribune sent to him regularly at Rochester, New York, and also had an occasional copy of the Belt Herald sent to him at the same place by a friend. That he did not see or know anything of the filing of mineral application No. 581 until after his return to Lead City on the 13th day of May, 1891, for the first time since his departure in November, 1890.

That he was first informed of said application by one of the officers of the United States land office at Rapid City, S. D., while in conversation with him upon other business on the 14th day of May, 1891.

Your office decided, February 4, 1892, that "the publication of said notice was not made in a newspaper 'published nearest to such claim,'" as required by law and the regulations. That judgment was reversed by said departmental decision, it being held therein "that the register did not exceed the official discretion vested in him in ordering the publication in the Deadwood Pioneer."

Review of this decision is now asked, and the errors specified, which are necessary to consider in this motion, are that it is contrary to the established regulations; that the publication of the notice was not in a paper nearest the land, and in not ordering a new publication or a hearing to determine whether the publication was made in a newspaper published nearest the claim, and in directing your office to consider the affidavits relating to the posting of the notice on the claim.

After a careful consideration of the entire record in this case, I am impressed with the belief that there should be a modification of the decision complained of. It is conceded that the paper in which the notice was published is not nearest the claim, but it is claimed that by the usual routes of travel communication between the claim and Deadwood was quicker and easier than between Lead City and the claim, and that greater publicity was given by publication in the Deadwood Pioneer than would have been obtained by publishing the notice in one of the Lead City papers; that a high mountain intervenes between the claim and Lead City, which prevents all direct communication. Affidavits of two persons are also presented in which they say that Bretell admitted to them that he had received notice of this application during the period of publication. Bretell denies this admission

under oath, and he also swears that there were not to exceed three copies of the Deadwood Weekly Pioneer received at the postoffice, or otherwise distributed in Lead City during the period of publication.

It appears to me that under this showing, and in view of all the conflicting statements, there should be a hearing ordered to ascertain the facts in regard to both publication notice and the posting of the notice on the claim. I am constrained to make this order for two reasons; first, it will be noticed that Bretell makes this application in his own individual capacity and behalf, but in his protest alleges "that he is one of the owners of the Rochester Extension." It does not appear by the record before me whether the other owners did or did not have notice of this application. If they did have notice, then they were bound to act, and in the absence of any fraud, Bretell would be bound by their knowledge. This is upon the theory that there was no abuse of the judicial discretion with which the register is clothed in the selection of the newspaper.

Second. I am not satisfied from the record that there was any abuse of the power of the register and receiver in ordering the publication. There is not such a great difference in the distance from the claim to the two towns as would necessarily make the publication in Deadwood void.

The concensus of the rules and decisions seems to be that the notices must be published in an established newspaper, with a *bona fide* circulation in the neighborhood of the claim; one that is printed at the place of its publication, and is, in his best judgment, permanently established and recognized by the community, its advertisers and readers, as being a fixture. I take it that newspapers of this character are to be selected in preference to those predatory journals that are frequently found in new localities, established often times for the sole purpose of getting the "land office notices and ready to migrate to the newer settlement when business becomes "slack" from the local office. In the exercise of this function the register is clothed with a discretion which has been termed "judicial discretion," subject, of course, to review. In the lawful exercise of that discretion he may select a newspaper that he conceives best for the purpose of giving the greatest publicity to the notice, even although it may not be nearest the land, and especially would this be true if the one nearest the land, in his opinion, did not meet the requirements as to permanency and general circulation, as defined above. And this is the gist, in my opinion, of the case of Condon et al. v. Mammoth Mining Co. (15 L. D., 330), and nothing more. In that my predecessor said:

That portion of section 2325 of the Revised Statutes under which notices of this character are published, necessary for consideration in the determination of the question here involved reads as follows:

"The register of the land office, upon the filing of such application, plat, field notes, notices and affidavits, shall publish notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as pub-

lished nearest to such claim; and he shall also post such notice in his office for the same period."

I am of the opinion that this means that the register shall publish the notice of such application in a paper to be by him designated as being the newspaper published nearest to such claim, not by actual measurement in a direct line between newspaper offices in the same town or city, but in the nearest town or city in which a paper or papers of established character and general circulation is published. Unquestionably, under this statute, when several newspapers are published in the same town or city, the register may designate whichever in his judgment will best subserve the public interests and which will give the widest notice to the public that the entrymen are seeking title to a mine. From these views it follows, that in this matter the register has some discretion in the designation of the newspaper, as to its established character as a newspaper, the stability and general circulation and the like.

It is said by the register, in a communication addressed to your office, under date of July 18, 1892, that one of the papers mentioned by Bretell as being published in Lead City "was short lived and has already ceased publication."

You will direct the local officers to order a hearing for the purpose of determining -

I. Whether either of the owners, or those in charge, of the Rochester Extension lode did have notice, by publication or posting of the application for patent for the Sulphur lode.

II. Whether the publication of the notice in the Deadwood Weekly Pioneer was such as was warranted by law and the ruling in this case as to an established newspaper, and whether it did have general circulation in the vicinity of the claim.

The motion for review is granted to this extent, and the papers herewith returned for filing in your office.

SETTLEMENT RIGHTS—RESIDENCE—TENANT.

FLEMING v. THOMPSON.

Residence on land not subject to settlement is ineffective, if abandoned or discontinued before the land becomes subject to settlement and not resumed until after the intervention of an adverse right.

Settlement rights can not be maintained through the occupancy of a tenant.

First Assistant Secretary Sims to the Commissioner of the General Land Office, December 19, 1893.

The land involved in this controversy are lots 1, 2, and 3, Sec. 24, and lot 1, Sec. 25, T. 16 S., R. 1 W., M. D. M., San Francisco land district, California.

John W. Fleming filed his pre-emption declaratory statement for the tracts, on the first of August, 1890, alleging settlement on the 7th of September, 1889. On the said first of August, 1890, William W. Thompson made homestead entry for said lots, and for the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section 25.

The land in question was formerly included within the claimed limits of the Rancho San Jose Sur Chiquito, the grant to which was confirmed June 2, 1882. The final survey of said rancho was made in the field in December, 1884, and January, 1885; approved by the Surveyor-General December 5, 1885, and patent issued May 4, 1888, at which time the plat was formally approved by the General Land Office.

The township plat of survey in which the land is situated was filed in the local office on the first of August, 1890, and the land then became subject to filing and entry, having been subject to settlement under the pre-emption and homestead laws since the approval of the plat of survey.

Each of the parties gave notice of his intention to make final proof on the 10th of November, 1890, and in accordance therewith, such proof was submitted, and a hearing had to determine the rights of the respective parties.

After considering the evidence, the local officers, on the 13th of May, 1891, rendered their decision, awarding the land in controversy to Thompson. On the 12th of July, 1892, such decision was affirmed by your office, and a further appeal brings the case to the Department. In reference to the facts of the case, there is no material conflict.

On the part of Thompson it was shown that he settled on the land in controversy in June, 1877, and maintained an actual residence thereon up to October 8, 1887, at which time he leased his ranch to B. P. Skinner for a year. At the end of the year the lease was voluntarily renewed for another year. At the end of the second year Skinner, on demand, refused to surrender possession, and, on suit brought, he was awarded possession by the court for the third year. At the termination of the third year Thompson resumed full possession and has since maintained an actual residence on the land.

On the part of Fleming it was shown that his first act of settlement was made September 7, 1889, when he hauled lumber on the land to build a house. He established his actual residence on the tract on the 9th of that month, and thereafter, continued his residence thereon.

It was shown that the health of Thompson's wife, at the time he leased his ranch to Skinner, and removed therefrom, was such as to require medical attendance which could not be obtained at the ranch, and that during his absence he resided at San Jose, where his wife received necessary medical attention, and his daughter went to school.

The question in the case is one of law, and not of fact. It is this: Did Thompson, at any time after the land in question became subject to settlement under the pre-emption and homestead laws, make settlement thereon prior to that of Fleming? also, was he, at the time said land became subject to such settlement, an actual settler thereon, in contemplation of law, so as to make his settlement relate back to a settlement established prior to survey, so as to entitle him to the preference right of entry over Fleming, under the law?

It is conceded that Thompson settled upon the land in June, 1877, and continued to reside thereon until October, 1887, when he leased it to Skinner, and removed to San Jose. During all this time the land was within the claimed limits of the Mexican grant, and had not been restored to the public domain, by the segregation and patenting of said grant. He did not resume his residence thereon until October, 1890, which was more than two years and five months after it became public land of the United States, and more than two months after the plat of survey was filed, and it became subject to entry.

Can a settlement, established in person on reserved land, and discontinued before said land becomes a part of the public domain, and not re-established by personal residence until after the land becomes subject to entry under the public land laws, be maintained during the interval by an agent or lessee, so as to defeat the rights of a settler who is actually residing on the land at the time its restoration to the public domain takes effect?

In other words, does the law contemplate that the ownership of the possessory right and improvements upon a tract of land, on which a personal settlement has been made, and discontinued (temporarily perhaps) before the land becomes public land of the United States, is sufficient to constitute a settlement right on unsurveyed land because such ownership and improvements exist when the land becomes public land before survey, and can such right be maintained by the occupation of such improvements by an agent or tenant to the exclusion of a subsequent settler before survey?

Section 2259, Revised Statutes, provides that any person possessing the prescribed qualifications, "who has made, or hereafter makes settlement in person on the public lands subject to pre-emption, and who inhabits and improves the same," etc., is entitled to the right of entry of the land so settled, under the pre-emption law, upon the performance of certain conditions after the plat of survey is filed, and by the third section of the act of May 14, 1880 (21 Stat., 140), the same right is extended to one who settles with the intention of claiming the land under the homestead law.

It will be observed, however, that this right depends upon a settlement *in person* on the *public* land, and upon inhabitancy and improvement *in person* by the settler on public land. Neither settlement by proxy, nor inhabitancy and improvement by an agent or tenant, confers or attaches any right under either act, nor does settlement on reserved land, not subject to pre-emption confer any right. A settlement on reserved or segregated land is of no force or effect while such reservation or segregation exists. *Oliver v. Thomas et al.* (5 L. D., 289); *Hosmer v. Wallace* (97 U. S., 575).

Lands claimed under Mexican grants in California, are excluded from settlement under the pre-emption laws, so long as the claims of

the grantees remain undetermined by tribunals and officers of the United States. *Van Reynegan v. Bolton* (95 U. S., 33).

It seems clear, therefore, that Thompson could acquire no right to the land in controversy by reason of his settlement in 1877, and his ownership of the improvements prior and up to the time the land became part of the public domain, May 4, 1888. At that time he was not personally inhabiting the land, but he had leased it to Skinner, and was himself residing elsewhere. He did not resume his personal residence on the land while it was unsurveyed public land of the United States, subject to pre-emption, nor indeed until more than two months after the township plat of survey was filed, and it became subject to entry. He had initiated no claim or right by a settlement in person on the *public lands* of the United States, and he made no inhabitancy or improvement on *public lands*. His personal settlement and personal inhabitancy were confined to a period when this land was segregated and reserved from the public domain, and the only inhabitancy and improvement thereon after it became public land of the United States, and prior to survey were by Skinner, as the tenant and lessee of Thompson, and by Fleming in his own behalf.

Settlement can neither be established nor maintained by proxy. It is a personal act and must be performed by the settler in person. *Knight v. Haucke* (2 L. D., 188). Occupation through a tenant is not the maintainance of residence requisite under the public land law. *West v. Owen* (4 L. D., 412).

Residence on land not subject to entry is unavailing if abandoned or discontinued before the land becomes subject to entry, and not resumed until after the intervention of an adverse right. *Crumpler v. Swett* (8 L. D., 584), and failure in residence is not excused by bringing suit in the courts for possession. *Forbes v. Driscoll* (3 L. D., 370).

From the authorities cited, I think it is clear that a settlement and residence established on reserved land, not subject to pre-emption, confers no right. That a legal settlement must consist of a settlement in *person*, and inhabitancy in person on *public land*, in order to attach a right under the settlement laws. If, however, a settlement is made on reserved land, accompanied by personal inhabitancy and improvement, which is continued until the land becomes a part of the public domain, it that instant becomes a legal settlement, not by reason of any acts performed before the land became subject to settlement, but because of the existence and continuance of such settlement from that date. The Department has held that in determining the rights of claimants to such land, the priority of their settlement may be considered.

Thompson having initiated no settlement upon *public land*, nor maintained the settlement made by him upon reserved land until it became subject to settlement, possessed no rights that could relate back to a settlement, when he filed his homestead entry.

Fleming, on the contrary, made an actual personal settlement on this land while it was unsurveyed *public lands* of the United States, subject to pre-emption. He continued to inhabit and improve the same until survey, and subsequent thereto, and filed his pre-emption declaratory statement within three months after survey. I am of the opinion, therefore, that he is the only one who acquired a legal right under the law, that will relate back to the date of his settlement before survey.

Thompson made no personal settlement on public land until after the settlement right of Fleming had attached. I recognize the equities of Thompson, but I can not ignore the plain and positive requirements of law, and substitute therefor equitable considerations. Under the law the rights of Fleming are superior to those of Thompson, in the land in controversy, and the decision appealed from is accordingly reversed.

JOHNSON ET AL. *v.* McKEURLEY.

Motion for review of departmental decision of February 16, 1893, 16 L. D., 152, denied by Secretary Smith, December 19, 1893.

MINING CLAIM—SURVEY—NOTICE OF APPLICATION.

JOHN K. CASTNER ET AL.

An amended survey and republication of notice will be required where it is found that the land embraced within the application, as set forth in the official survey and published notice, is incorrectly described.

Secretary Smith to the Commissioner of the General Land Office, December 19, 1893.

I have considered the appeal of John K. Castner *et al.* from your office decision requiring them to re-advertise their application for patent for the Vista, Paragon and Puzzler lode claims, the same being mineral entry No. 2597, Helena, Montana, land district.

It appears that Castner *et al.* made application for patent for said claims, and the same was adverse by James L. Henry *et al.* for conflict with the Bob Clark lode. Suit was instituted in the district court of Cascade county, Montana, in support of said adverse. A plea having been entered to the jurisdiction of the court, the matter was submitted to a jury, and the verdict was that the property involved "is situated in the county of Meagher, State of Montana." Judgment was therefore rendered for the defendants October 2, 1891. Final entry was made December 31, 1891.

On March 3, 1892, Henry *et al.* presented a protest against the issuance of patent, in which is recited the former adverse proceeding; their ownership of the Bob Clark lode and its prior location; that the Para-

gon and Puzzler claims were shown by the official survey to be situate in T. 16 N., R. 8 E., in Cascade county, and on unsurveyed lands; that as a matter of fact said claims are situate in T. 15 N., R. 8 E., in Meagher county; that relying on the correctness of the survey, they brought their action in Cascade county. They ask that an order be issued requiring applicants to re-publish their application. On October 3, 1891, Mike Hendrickson filed a similar protest against these claims, claiming the Zilla and Utah lodes, as being in conflict with said mineral entry.

On May 9, 1892, your office ordered that the notice be republished, as it appears that the survey of the Paragon and Puzzler was erroneous and misleading. Subsequently—June 25—on petition of claimants, your office “granted a stay of proceedings for 60 days,” in order to complete the record, and on October 15, following your office again considered the whole matter on a motion for review of said decision of May 9, and overruled the motion. The case now comes before this Department on appeal. There are several specifications of error, but I think they amount substantially to the claim that it was error to hold that the applicants failed to have a proper survey made of their claim and to give a correct notice of their pending application so that those claiming adverse rights might have sufficient notice of the locus of the property sought to be patented.

The mining claims in controversy are situate in the Barker (unorganized) mining district. By the jury they were found to be in Meagher county. They are within a few hundred feet of the north line of said county, the same being the south line of Cascade county. This line was first run by Surveyor Kern in 1888, and again by one McIntyre, whose report was filed in September, 1890, and it seems to have been accepted by the county commissioners as the dividing line. By extending the township lines on the map it is found that T. 16 N., R. 8 E., is in Cascade county, while T. 15, same range, is in Meagher county.

The notices of the location of the Paragon and the Puzzler lodes show that each of them was situated in Cascade county, and each were recorded in that county. The Paragon was located January 28, 1889, and the Puzzler April 17, 1889. The Vista is described as being in Meagher county; was located May 25, 1885, and recorded in that county.

The three claims are not located in a compact body, but, according to the plat of the official survey, run lengthwise in a northwesterly and southeasterly direction, the northwesterly corner of the Paragon joining the Vista near its southeast corner, and the northwesterly corner of the Puzzler joining the Paragon at about the center of its easterly side line. Thus it will be seen that the Vista is the farthest north, hence nearest the county line, whilst the other two claims extend nearly the entire length south of the south end of the Vista, and that much south of the county line and farther into Meagher county. The

official plat also states that they are situated in "T. 16 N., R. 3 E. (unsurveyed)," and "in Barker (unorganized) mining district, Cascade county, Montana." Throughout all the papers in connection with this entry, and in the publication notice, this statement is also made.

These facts are not controverted, but it is insisted by counsel that sufficient notice was conveyed to those holding adverse claims to enable them to defend their rights. I cannot agree with this proposition. The locus of a mining claim should be fixed with mathematical accuracy, as well in the report of the official survey as upon the surface of the earth. A better illustration for the necessity of this can not be afforded than by the case at bar. Persons claiming adverse rights against a mining claim are required by law (Sec. 2326 Revised Statutes) to file the statement of their claim in the local office during the period of publication, and within thirty days thereafter "to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession." It is an invariable rule that the jurisdiction of a State court, so far, at least, as the trial of real property rights is concerned, is confined to the county in which the land is situated. Now, in this case, the land is described in the official survey, the only means provided by law for fixing the locus, as being in Cascade county. They brought suit in that county, and the result was that the court, on the verdict of the jury, decided that it did not have jurisdiction, the land being situated in another county. The plaintiffs were justified in relying on the official survey. It will not do to say that they were bound to accurately ascertain by their own methods the exact locus of the land. The government commissions an officer for that purpose, and thus holds out the assurance that their official acts may be relied upon, and, if for any cause, those claiming adverse rights are defeated by reason of a defective survey, the government is certainly bound to put them in *statu quo* as nearly as possible, and that may be done by cancelling the entry, requiring a corrected survey, and the re-publication of the notice.

The applicants for patent are not without fault in this matter. The Paragon and Puzzler lodes are described as being in Cascade county, while the Vista, located several years prior, and nearer the county line by almost its entire length than the others, is properly put in Meagher county. Now, the Vista being in Meagher county, it follows as a physical fact that the others were also, and it was their duty to amend the location of the other claims in accordance with the fact before seeking to obtain an official survey.

Your office decision is therefore affirmed.

TOWNSITE OF MOORE *v.* TURNER ET AL.

Motion for review of departmental decision of May 31, 1893, 16 L. D., 476, denied by Secretary Smith, December 19, 1893.

APPLICATION FOR SURVEY—MEANDER LINE.

EDWARD C. HILL.

An application for the survey of a small tract of land, lying between the meander line of a lake and the water's edge, will not be granted, where the original survey has stood for a number of years, even though the meandered boundary of the lake may not exactly indicate the true water line.

First Assistant Secretary Sims to the Commissioner of the General Land Office, December 19, 1893.

Edward C. Hill has appealed from the decision of your office, of December 31, 1892, denying his application for the survey of a tract of land extending into Lake Steilacoom, situated in Sec. 4, T. 20 N., R. 2. E., W. M., Washington.

In the case of *Hardin v. Jordan* (140 U. S., 371), it is said:

It has never been held that the lands under water, in front of such grants of meandered lands, are reserved to the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The meander lines run along, or near the margin of such waters are not run for the purpose of limiting the title of the grantee to such meander lines.

In *Mitchell v. Smale* (140 U. S., 406) Mr. Justice Bradley, delivering the opinion of the Court, said:

Our general views with regard to the effect of patents granted for land around the margin of a non-navigable lake, and shown by the plat referred to therein, to bind on the lake were expressed in the preceding case of *Hardin v. Jordan*, and need not be repeated here. We think it a great hardship, and one not to be endured, for the government officers to make new surveys and grants of the beds of such lakes, after selling and granting the land bordering thereon, or represented so to be. It is nothing less than taking from the first grantee a most valuable, and often the most valuable part of his grant. Plenty of speculators will always be found, as such property increases in value, to enter it and deprive the proper owner of its enjoyment; and to place such persons in possession, under a new survey and grant, and put the original grantee of the adjoining property to his action of ejectment and plenary proof of his own title, is a cause of vexatious litigation, which ought not to be created or sanctioned.

And it was held in that case that the projection of a strip or tongue of land beyond the meandering line of the survey, is entirely consistent with the water of the pond or lake being the natural boundary of the granted land, which would include the projection, if necessary to reach that boundary.

There seems to be no reason why these principles are not applicable to this case.

The burden of the evidence submitted, is to show that there has been no change in the character of the land along the shore of the lake, since the date of official survey; at the point where the land which is sought to be surveyed is located.

I concur with you that if this fact were fully established, the Department will not, after so great a lapse of time, direct a survey and dis-

pose of a small tract of land between the claim and the water, although it may be shown that the meander line did not exactly indicate the true water line, and that by this means a small fraction of land was left out which might, or should, have been included.

I can see no reason to disturb the action of your office, denying the application for survey, and it is accordingly affirmed.

POMOSENO CAMPOS.

Motion for review of departmental decision of April 11, 1893, 16 L. D., 430, denied by Secretary Smith, December 19, 1893.

SOLDIERS' DECLARATORY STATEMENT—MILITARY SERVICE.

AUGUR v. MCGUIRE.

(On Review.)

In determining whether the length of military service rendered by an officer (who resigns from the service) entitles him to file a soldier's declaratory statement, the period of service should be computed to the time when he receives notice that his resignation is accepted.

Secretary Smith to the Commissioner of the General Land Office, December 19, 1893.

I have considered the motion for review, filed on behalf of McGuire, of the departmental decision rendered on the 13th day of April, 1893, in the case of Joseph Augur v. Frank M. McGuire, (reported in 16 L. D., 372) involving the validity of the soldier's declaratory statement filed by said McGuire, on the 23d day of February, 1891, for the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 23, T. 47 N., R. 9 W., Ashland land district, Wisconsin.

It appears that on February 23, 1891, McGuire filed in said local office soldier's declaratory statement covering said land, which statement was accompanied by his affidavit of service in the army during the war of the rebellion, and also a certified statement by the Adjutant-General of the State of Wisconsin, made from the records of his office, showing that McGuire enlisted in Company C of the 8th Wisconsin Infantry Volunteers on the 20th day of July, 1861, and was commissioned as second lieutenant in said company and regiment on the 4th day of September, 1861, to rank from the 29th day of August, 1861; that he was mustered into the service of the United States on the 9th day of September, 1861, for three years, "and resigned on the 5th day of October, 1861."

On the 24th day of February, 1891, Joseph Augur tendered his home-

stead application for said land, which was rejected on the same day by the local officers, on account of McGuire's prior filing.

Augur did not appeal, but on the 11th day of March, 1891, he filed an affidavit of contest against McGuire's filing, alleging that he (Augur) had settled thereon on September 15, 1890, and had substantial improvements, and resided on it with his family.

He made no charge against the sufficiency of McGuire's military service to entitle him to file soldier's declaratory statement for said land, but based his claim entirely upon his alleged prior settlement. A hearing was had upon this issue. From the testimony introduced the register and receiver found that said land had "not been settled upon and cultivated according to law, and that contestant acquired no prior settlement right." From this decision an appeal was taken to your office, and while it was pending, within six months after filing his soldier's declaratory statement, McGuire tendered his application to make homestead entry of the tract. His application was held by the local officers, subject to the result of the contest initiated by Augur.

On the 30th of March, 1892, your office affirmed the judgment of the local officers, holding that Augur secured no right to the land by reason of his alleged settlement. In said decision it was also held that McGuire was not qualified to file soldier's declaratory statement for the land, in that he had not served for ninety days in the army of the United States. It was further held that the land was subject to entry at the time Augur presented his homestead application, and the local officers were directed to notify him that his entry would be made of record, upon his showing the proper qualifications. In consequence of such decision he made homestead entry for the land in question on the 7th day of April, 1892.

McGuire appealed to the Department, alleging that your office decision was erroneous in holding that he was not qualified to make soldier's declaratory statement, in rejecting his homestead application, and in allowing Augur to make homestead entry for the land.

The decision of your office was affirmed by the Department on the 13th of April, 1893, by the decision which I am asked, in the motion for review, to reconsider and recall.

The motion asks that the departmental decision be recalled and a hearing ordered to determine the army service of McGuire, and is supported by numerous affidavits respecting such service.

In view of the conclusion I reach in the case, it is only necessary to notice the third specification of error contained in the motion for review, which is as follows:

"3. Said decision is erroneous in finding from the *ex parte* statement of the Second Auditor that McGuire's 'service in the army' terminated on October 5, 1861."

To determine whether it would be of any advantage to McGuire, to

grant his request, and order the hearing asked for by him, I addressed a communication to the Secretary of War, on the 3d of October, 1893, asking for an official statement of McGuire's military record.

In response to such request, under the same date, I received the following reply:

In reply to your letter of to-day, requesting an official statement of the military record of F. M. McGuire, late of Company C, 8th Wisconsin Infantry Volunteers, I am directed by the Secretary of War to inform you that the official records show as follows:

Frank McGuire was mustered into service as second lieutenant with Company C, 8th Wisconsin Infantry Volunteers, at Madison, Wis., to date from September 9, 1861, to serve for three years.

He tendered his resignation at Camp Randall, Wis., October 5, 1861, stating that he deemed himself incompetent to fulfill the duties imposed upon him, and it was accepted, to take effect from October 5, 1861, in Special Orders No. 27, paragraph 2, Department of the Missouri, dated January 9, 1862.

It seems to me that this statement must be held to be conclusive as to the length of time McGuire actually served in the Army, for the mere tender of his resignation would not, and could not, operate as a matter of law, or fact, to take him out of the military service of the United States. This proposition is clearly settled by the 49th Article of War (See Rev. Stats., p. 233) which is as follows:

Any officer who, having tendered his resignation, quits his post or proper duties, without leave, and with intent to remain permanently absent therefrom, prior to due notice of the acceptance of the same, shall be deemed and punished as a deserter.

It is not shown when McGuire received the "due notice" of the acceptance of his resignation, but surely it was after the order of January 9, 1862, up to which time he was actually in the service, which shows his term of such service to have been more than five months.

The departmental decision was, therefore, erroneous, wherein it was found that McGuire had not served in the army for a period of ninety days or more. Said decision is accordingly recalled and set aside. Your office decision appealed from is reversed, Augur's entry must be canceled, and McGuire will be permitted to make entry for the land in question under his soldier's declaratory statement.

SWAMP LAND GRANT—CHARACTER OF LAND.

MORROW ET AL. v. STATE OF OREGON ET AL.

Lands covered by an apparently permanent body of water at the date of the swamp grant are not of the character contemplated by said grant.

Secretary Smith to the Commissioner of the General Land Office, December 19, 1893.

On December 29, 1892, John Mullan, Esq., as counsel for J. L. Morrow, et al., filed in this Department a petition, addressed to the Secretary of the Interior, praying him to exercise his supervisory jurisdiction

over certain proceedings, had and being had, in respect to 4740.82 acres of public land lying in Warner Valley, Lake county, Oregon, and described in lists Nos. 30 and 31 of swamp and overflowed lands selected by the State of Oregon, under the provisions of the act of March 12, 1860, and of General Land Office circulars of November 21, 1850, and April 18, 1882, in the land district of Lakeview, Oregon. Copies of said petition, and of eight exhibits filed therewith, were served upon the governor of the State of Oregon. Said lists Nos. 30 and 31 had been approved by Secretary Noble himself, on April 9, 1892, and December 3, 1892, respectively, "subject to any valid adverse right that may exist to any of the tracts therein described."

On January 9, 1893, the Secretary took cognizance of said petition, and transmitted it to your office for your information and report thereon, and directed that you issue no patents to the State of Oregon for lands within "said survey," until further advised by this Department. You were also instructed to transmit with your report, all motions and protests filed by counsel against the approval of said list No. 31.

On January 23, 1893, James B. McCrellis, as "attorney for R. F. McConnaughy, *et al.*, assignees of the State of Oregon," filed in this Department a petition addressed to the Secretary of the Interior, praying that orders be issued to patent to the State of Oregon the lands described in said list No. 30. A copy of said petition was served upon Mr. Mullan.

On the same day, January 23, 1893, Messrs. John Mullan and Jos. K. McCammon, as "counsel for the heirs of Emma Neasham, George F. Maupin, Jesse B. Morrow and J. L. Morrow, *et al.*, dry land claimants," filed in this Department a supplemental statement with twenty-three exhibits attached thereto, in further support of Mullan's petition filed December 29, 1892. Service of said petition was acknowledged by Mr. James B. McCrellis, as attorney for the assignees of Oregon.

On January 24, 1893, your office made report as required by said departmental letter of January 9, 1893, and transmitted therewith fifteen files of papers.

On February 10, 1893, Messrs. Mullan and McCammon filed in this Department another voluminous statement, with ten exhibits attached thereto, and service of same was acknowledged by Mr. McCrellis.

On March 2, 1893, my predecessor, on consideration of your report aforesaid, and the accompanying papers, "and other charges and allegations made in certain papers filed here," since his former letter, by Messrs. McCammon and Mullan, was "of opinion that all action tending to the approval or patenting of lands to said State, embraced in the Neal survey, should be further suspended." And in his letter to your office, of that date, he revoked and canceled his own approval of said swamp land lists Nos. 30 and 31, and directed you to take proper steps to make said revocation and cancellation formally effective. He also directed you at once to make full report to this Department in

relation to all matters set forth by Messrs. McCammon and Mullan, so far as the same came within the cognizance of your office, transmitting here all papers relating to said matters, that the same might be fully considered, and proper directions given in the premises.

By your letter "K," of March 13, 1893, you made the report required by my predecessor, and transmitted therewith twenty-four files of papers, deemed by yourself pertinent. With your letter "K," of March 27, 1893, you transmitted plats of surveys, documents and papers, collected in files, and marked by the letters of the alphabet from A to M, inclusive, the same being papers which Messrs. Mullan and McCammon, on one side, and Mr. McCrellis on the other, deemed pertinent, and desired to have transmitted for consideration by the Secretary.

With your letters of April 6, and April 19, 1893, you transmitted other papers, which were deemed by your office, or by counsel, as pertinent, and proper to be considered by the Secretary.

Between March 2, and August 2, 1893, Messrs. Mullan and McCammon, attorneys for Morrow, and others, have filed eight papers; and Mr. McCrellis, and Messrs. Stockslager and Heard, as attorneys for R. F. McCannaughy, and others, assignees of the State of Oregon, have filed six papers, containing arguments, statements and affidavits in support of their several contentions; of all which both sides have had notice.

And now, with all parties interested present here by counsel, duly notified and fully heard, and after careful examination and supervision of the great mass of papers before me, containing all the information accumulated during many years of eager, intelligent and industrious contest, I proceed to make such decisions, and give such directions as appear to me to be lawful, right and proper.

The lands involved in the pending controversy are embraced in lists Nos. 30 and 31, of swamp and overflowed lands which had been selected by the State of Oregon, in Lakeview land district, and which lists were approved by the Secretary of the Interior on April 9, 1892, and December 3, 1892, respectively, subject to any valid adverse rights that might exist as to any of the tracts therein described.

When these lists were presented to the Secretary of the Interior, for his approval, they appeared to be clear lists of swamp and overflowed land, to which were attached the certificates of the clerk of the swamp land division and the Commissioner of the General Land Office, certifying that said lands were swamp and overflowed within the meaning of the act of September 28, 1850, and that upon examination of the tract books of that office the claim of the State had been found to be free from conflict by sale or otherwise. Upon these certificates the Secretary approved the lists. Subsequently, however, upon information furnished by the Land Office that adverse claims to tracts involved in said lists were then pending in that office, and had not been disposed of, and that the character of said lands was contested by adverse claim-

ants the Secretary directed that the Commissioner re-transmit to the Department all the papers in said case. Thereupon the Secretary revoked and canceled his approval of said swamp lands lists 30 and 31, and directed the Commissioner to make such revocation and cancellation formal and effective, and to make full report to the Department in relation to all of the matters set forth in the petition of the several claimants. Upon the filing of the Commissioner's report thereon, counsel for the State and also those for the contestants were notified that they would be permitted to file arguments in said case; and the question now presented by said report is whether said lands were swamp and overflowed within the meaning of the acts of September 28, 1850, and March 12, 1860.

A careful review of the testimony in this case shows beyond all question that the lands involved in this controversy were once covered by a large body of water, known as Lake Warner; and that, at the date of the grant and of the survey, all the lands embraced in lists 30 and 31 were covered by this lake—which, according to the testimony of some of the witnesses, was too deep to be forded; and that between 1874 and 1877 the water began to recede, so that now almost the entire tract which was formerly the bed of the lake is comparatively dry; and that the recession was quite rapid during the last two years prior to March 30, 1889.

The ruling of the Department is, that the lands covered by an apparently permanent body of water at the date of the swamp grant are not of the character contemplated by the grant. (State of California, 14 L. D., 253.) If this ruling be adhered to in this case, and I see no reason to depart from it, the lands embraced in said lists are clearly not of the character contemplated by the grant, and the State has no claim to them as swamp and overflowed lands.

It seems that nearly, if not quite all, of the lands aforesaid, described by subdivisions in lists 30 and 31, and embraced in this decision, are claimed under the pre-emption, homestead, timber-culture, and desert-land laws, by persons who initiated their proceedings in the year 1889; that nearly, if not quite all, of said claims have been contested by the State of Oregon, or by persons alleged to be her assignees, and that many decisions have been made in favor of such contestants. Indeed, it is stated in the printed brief of Messrs. McCrellis, Stockslager and Heard, that only fourteen such cases are left in the land office to be disposed of, including two applications to file. The papers before me are not sufficient to enable me to ascertain the present status of said claims and contests, with precision. I therefore direct that you cause all decisions recommending or holding for cancellation entries or declaratory statements, upon the ground that the lands in contest were granted to the State of Oregon as swamp and overflowed lands, by the act of March 12, 1860, to be set aside and annulled, and the cases reinstated; and all contests based upon said ground, alone, to be dis-

missed; and that you require all bona fide claims to said lands, lawfully initiated, to be prosecuted and perfected with all due diligence, according to law and the Rules of Practice.

Lists 30 and 31, and all the papers filed in connection therewith, are herewith returned.

STATE SELECTIONS—ACT OF FEBRUARY 22, 1889.

STATE OF WASHINGTON.

Selections under section 12, act of February 22, 1889, for public building purposes, must be made in legal sub-divisions of not less than one quarter section.

Secretary Smith to the Commissioner of the General Land Office, December 19, 1893.

Olympia, Washington, list No. 1, of selection for public buildings under section 12 of the act of February 22, 1889 (25 Stat. 676), was returned with departmental communication dated June 22, 1893, for the reason that said list was made up of selections of less than a quarter section.

Said section granted a specific quantity of land to be selected and located "in legal subdivisions as provided in section ten of this act," and section 10 provides for selections "in legal subdivisions of not less than one-quarter section."

I am now in receipt of your letter of November 13, 1893, in explanation of the previous action in submitting said list for approval, in which my attention is called to the instructions contained in departmental communication of April 22, 1891 (12 L. D., 400), which, you state, are in conflict with my action taken in returning this list.

In said communication the effect of the act of February 28, 1891 (26 Stats., 796), amending sections 2275 and 2276 of the Revised Statutes, upon the provisions of the act of February 22, 1889 (*supra*), was considered, and it was held that, so far as in conflict, the grant of school lands should be administered and adjusted in accordance with the later legislation.

Said amendment of sections 2275 and 2276 R. S., relates solely to the question as to what losses will support an indemnity selection under the school grant, the manner of its ascertainment, and the effect of selection upon the basis assigned.

It does not by terms or implication conflict with the requirement made in the act of February 22, 1889, that the selections are to be made "in legal subdivisions of not less than one quarter section."

Again, the grant made by the 12th section, under which the selections under consideration are based, is one of a specific quantity to be selected.

It has no indemnity provision as the school grant, and can in nowise be affected by the amendment of sections 2275 and 2276.

The previous instructions given in this matter will, therefore, be carried into effect.

SCHOOL INDEMNITY—FOREST RESERVATIONS.

INSTRUCTIONS.

Secretary Smith to the Commissioner of the General Land Office, December 19, 1893.

I am in receipt of your office letter of November 27, 1893, enclosing copy of a letter to the register and receiver at Los Angeles, California, relative to certain school indemnity selections in said district, made upon the bases of deficiencies in school sections caused by said sections being swamp and overflowed. The Department has held that the swampy character of a school section affords no basis for indemnity, and, in view of this decision, the State of California requests that all of the original selections made upon a swamp land basis be canceled, and that amendatory application designating as the basis of deficiency lands within the forest reserves be accepted in lieu thereof.

Upon this request you give the following instructions to the register and receiver:

First, that all selections and applications to select upon the basis of swamp lands must be canceled. *Second*, that the applications professing to be amendatory of former invalid selections, whereby other school lands are designated as the basis of the selection, can only be accepted as new applications or selections under which the right of the State to the land selected will take effect only from the time that such new application was presented at your office for filing, in the absence of adverse claims. *Third*, that unsurveyed school sections that are clearly shown to be within the limits of either of said forest reservations will be considered valid basis, to the extent of 640 acres for each full section, for the selection of school indemnity land. *Fourth*, that selections upon the basis of surveyed school sections within the said forest reservations will not be allowed under any circumstances; and all applications upon this character of basis now on file will be rejected, and the selections canceled.

The letter of instructions to the register and receiver is submitted to the Department for its consideration, with request to be advised whether such course should be approved, and if not, to be instructed in the premises.

I see no objection to the instructions. They appear to be in accordance with the decisions of the Department governing school indemnity selections.

PRACTICE—REVIEW—ORDER FOR HEARING.

MCCHESNEY ET AL. *v.* ABERDEEN ET AL.

Review of a departmental decision ordering a hearing will not be granted, where the questions raised by the motion may be considered when final action is taken on the merits of the case.

Secretary Smith to the Commissioner of the General Land Office, December 19, 1893.

John T. McChesney has filed a motion to "set aside and revoke" departmental decision, dated April 22, 1893 (16397), involving the SE $\frac{1}{4}$ of Sec. 14, T. 123 N., R. 64 W., Aberdeen, South Dakota.

It appears that one Abner C. McAllister had on October 3, and October 20, 1887, applied to file a pre-emption declaratory statement for the land, and your office on February 20, 1892, sustained the action of the local officers, rejecting his application because the land applied for was included within the incorporated limits of the city of Aberdeen.

In your said office decision, the application of the city of Aberdeen, filed through its mayor, to enter the land as an additional entry to the townsite of Aberdeen, was also rejected, because the city "in no manner owes its existence to the townsite laws of the United States, but was incorporated under the territorial laws of Dakota, being located wholly on private lands."

Other applications for the land were also rejected, but the applications of John T. McChesney and Joseph M. Kean, presented, respectively, on October 20, 1887, and March 27, 1889, to locate Porterfield scrip—the former for the S. $\frac{1}{2}$ and the latter for the N. $\frac{1}{2}$ of said SE. $\frac{1}{4}$ —were allowed.

From your said office decision it appears that McAllister was the only appellant, and in the decision, revocation of which is asked, the Department, under its supervisory powers, directed that a hearing be had,

when the facts in regard to its settlement, occupation and use may be ascertained, in order that the Department may have a basis upon which to determine its future disposal, whether it should be entered as a part of the townsite of Aberdeen, or as a separate townsite, or should be awarded to the pre-emption claimant or to the scrip applicants. The facts are not known to the Department, and before an intelligent and just decision can be rendered the facts must be known.

It will thus be seen that no decision was rendered on the merits, on account of the absence of certain facts upon which a proper disposal of the land depended, and a hearing was ordered that those facts might be ascertained.

It is insisted that said departmental decision should be revoked, because none of the parties for whose benefit the hearing was ordered can ever obtain title to the tract under any law now in existence; that McAllister, the pre-emption claimant, can not enter the land because the same is within the incorporated limits of Aberdeen, and that his claim is not strengthened by the remedial act of March 3, 1877; that as to all other claimants, the decision of your office became final by reason of their failure to appeal therefrom, and the supervisory power of the Secretary of the Interior can not be invoked to restore rights they may have lost at the expense of the *bona fide* scrip applicants; that even if this were not true, the city of Aberdeen can not make an additional entry of the tract, because there is no law authorizing the purchase of the land for the benefit of squatters thereon, especially where applications therefor were made after McChesney applied to locate his Porterfield scrip thereon.

Without discussing the various questions of law presented by this motion, it is sufficient to say that the Department, in its said decision,

did not reject the claim of Mr. McChesney, under his scrip application, nor was it decided that McAllister or the city of Aberdeen is entitled to the land; but it was decided that a proper disposal thereof depended upon certain facts not known to the Department, and which could be determined only by a hearing, which was ordered.

When the Department postpones the consideration of a case and a decision on the merits thereof, awaiting facts which are deemed important to a proper disposal of the land and a hearing is directed for that purpose, it is not perceived where any injury may result to an honest litigant, except the necessary one of a short delay.

Since an appeal will not lie from a decision of your office ordering a hearing (Practice Rule 81; *Reeves v. Emblen*, 8 L. D., 444), it is difficult to see upon what principle a departmental decision will be "set aside and revoked" for making a like order.

At all events, the various questions raised by this motion may be considered when action is taken on the merits after the hearing.

The motion is therefore denied.

SURVEY—ISOLATED TRACT—ISLAND.

CASE *v.* CHURCH.

An order for the survey of an island and the sale thereof as an isolated tract is a final departmental adjudication that the land is the property of the United States, and the determination of alleged adverse rights of riparian owners must thereafter be left to the courts.

First Assistant Secretary Sims to the Commissioner of the General Land Office, December 19, 1893.

I have considered the case of Timothy B. Case *v.* Frank E. Church, on appeal from the decision of your office, of June 6, 1892, dismissing the appeal and protest of Case, and denying his application to enter lots 9 and 10 of Sec. 11, and lots 6 and 7 of Sec. 14, T. 5 N., R. 6 E., of the Grayling land district, Michigan.

The land in controversy is an island in Long Lake, Michigan, and it appears that said Case bought the island, with improvements, from one Charles Bennett, about September 8, 1879, for \$1000, took possession of the same, and has continued to reside thereon ever since, having in the meantime made considerable valuable improvements on the same.

Some time in 1888 he discovered that his title was imperfect, and thereupon he began to take such steps as seemed to him proper and necessary to perfect the same. On July 21, 1890, he made formal application for the survey of said island. This application was approved by the Secretary of the Interior October 20, 1890, and the survey directed to be made, and the land ordered to be sold as government land under Sec. 2455, of the Revised Statutes, aforesaid.

Pursuant to this order, the tract was surveyed and regularly sold on November 17, 1891. The appellee Church became the purchaser at the price of \$1371.00, paid the purchase price, and the register and receiver issued to him cash certificate and receipt.

This action was then instituted by the appellant to prevent the issue of patent to the purchaser, and at the same time the said appellant made application to enter said tract of land under the pre-emption laws.

After the decision of your office, aforesaid, the question of the right of pre-emption seems to have been abandoned, and the brief filed here by appellant's attorney is addressed exclusively to the question of the power and duty of the government to consider appellant's equities in the case, and earnestly insists that the said Church be denied patent to the land, for the reason that the land bordering on Long Lake had been long since patented to various parties without limitations or restrictions, and that under the decision of the supreme court, in the case of *Hardin v. Jordan* (140 U. S., 371), and under the laws of the State of Michigan, the government had parted with its title to said island, to riparian proprietors, and that appellant, by virtue of his long continuous adverse possession of said island, had acquired prescriptive title thereto.

These are questions essentially for the courts to determine, and have no proper place in departmental adjudications. The question as to whether the land in controversy is, or is not, the property of the United States government became *res adjudicata*, so far as the power of this Department extends, when it was ordered sold by the Secretary of the Interior.

The judgment of your office is approved and affirmed.

PRE-EMPTION—CITIZENSHIP—NATURALIZATION.

MERIAM *v.* POGGI.

The residence of an alien in this country for the last three years of his minority qualifies such person, in the matter of citizenship, as a pre-emptor, without previous filing of declaration of intention to become a citizen.

The minor child of an alien, who has declared his intention to become a citizen but does not complete his naturalization before the child attains his majority, occupies under the pre-emption law the status of a person who has filed his declaration of intention to become a citizen.

Secretary Smith to the Commissioner of the General Land Office, December 19, 1893.

On the 7th of October, 1892, you transmitted, on the part of Maria Poggi, a motion for review of the decision rendered by the Department on the 27th of July, 1892 (unreported), in the case of F. B. Meriam against said Poggi.

The land involved in the controversy is lot 4, Sec. 18, T. 18 S., R. 1

W., and fractional lot 1, Sec. 13, T. 18 S., R. 2 W., S. B. M., Los Angeles land district, California.

Meriam made homestead entry for the land on the 21st of May, 1887. On the 2d of June, of that year, Miss Poggi presented her pre-emption declaratory statement for the land, alleging settlement on the 16th of March. Inasmuch as she alleged settlement prior to the entry of Meriam, her filing was accepted.

Afterwards she presented her final proof, Meriam appearing and protesting against the acceptance of the same. The local officers rejected her proof, holding that she was not a qualified pre-emptor at the date of her settlement, and that between that date and the date of her declaration of intention to become a citizen of the United States—May 30, 1887—the right of Meriam under his homestead entry attached. That decision was affirmed by you on the 24th of August, 1891, and by the Department on the 27th of July, 1892. The facts upon which the departmental decision was based, were that Miss Poggi was born in Italy in 1865, that she came to this country with her parents when about eighteen years of age, and that she made no declaration to become a citizen until May 30, 1887, the same day that she made her declaratory statement, which was after Meriam had made homestead entry for the land.

In the motion for review, in addition to those facts, it is made to appear that the father of Miss Poggi declared his intention to become a citizen of the United States during her minority, but did not attain full citizenship before she reached her majority.

Section 2167 of the Revised Statutes of the United States provides as follows:

Any alien, being under the age of twenty-one years, who has resided in the United States three years next preceding his arriving at age, and who has continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he has resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of section twenty-one hundred and sixty-five; but such alien shall make the declaration required therein at the time of his admission; and shall further declare, on oath, and prove to the satisfaction of the court, that, for two years next preceding, it has been his bona fide intention to become a citizen of the United States; and he shall in all other respects comply with the laws in regard to naturalization.

The counsel for Miss Poggi claim, that under this section of the Revised Statutes she was relieved from any act looking towards her naturalization, until two years after she became of age. At that time she would have resided five years in the United States, including the three years of her minority, and might then become a citizen of the United States, without any declaration of intention, except such as she would be required to make at the time of her admission. That during those two years she was a qualified pre-emptor, so far as the question of citizenship was concerned, and her rights as a pre-emptor

could only be defeated by her neglecting to become a citizen at the proper time.

The question involved was squarely passed upon by Secretary Delano, in the case of *Dougherty v. California and Oregon Railroad Co.*, reported in Copp's Public Land Laws for 1882, volume 2, page 929. Dougherty was an alien, who came to this country before he was eighteen years of age. After arriving at the age of twenty-one, he settled on and filed for a tract of public land as a pre-emptor. He was afterwards admitted to citizenship under section 2167, Revised Statutes.

It was urged against the claimant that at the date of his alleged settlement he was not a qualified pre-emptor, and not capable of acquiring title to public land under the pre-emption law. It was held

that his naturalization had a retroactive effect, and placed him on the same footing as to citizenship as one who had filed his declaration of intention before the date of settlement, and that so far as the question of citizenship was concerned, his settlement was valid, and he capable of acquiring title to the land.

In cases where an alien declared his intention to become a citizen, and died before securing his final papers, the Department has repeatedly held that the minor children of such alien might avail themselves of such declaration under section 2168 of the Revised Statutes. This was distinctly held in the case of *Scotford v. Huck* (8 L. D., 60). In that case, the father had declared his intention to become a citizen during the minority of the son, and died before obtaining his final papers. After reaching his majority, the son made pre-emption filing without taking any steps towards securing citizenship. The Department hold that the son inherited from his father the advantage of having a declaration filed, upon condition that he availed himself thereof by taking the final oaths.

In the case of *Bartl v. West* (8 L. D., 289), the case of *Scotford v. Huck* is cited, and its ruling followed. The only difference in the two cases is that one is a pre-emption, and the other a homestead case. After quoting section 2168 of the Revised Statutes, the Department said: "By operation of the statute just quoted, the declaration of the father to become a citizen of the United States, inured, upon his decease, to the benefit of the minor son, and the latter thereby became entitled to all the rights, by virtue of said declaration, that the father was entitled to in his life-time." The land in dispute was accordingly awarded to Bartl, subject to his completing his citizenship, and otherwise complying with the law.

In the case at bar, Miss Poggi has already completed her citizenship, a certificate to that effect, under section 2167 of the Revised Statutes, bearing date December 18, 1890, forming part of the record before me.

The questions presented for determination are: 1. Did the residence of Miss Poggi in this country during the last three years of her minority, confer upon her the right of pre-emption? 2. Does the minor child of an alien, who declares his intention to become a citizen, but

who does not secure citizenship during such child's minority, possess the same rights as would be possessed had such parent died during the minority of his child, without securing naturalization papers?

An affirmative answer to either of these questions, decides the case at bar, in favor of Miss Poggi.

A declaration of intention to become a citizen of the United States does not make the declarant a citizen. It is the initiation of the right thereafter to become such citizen upon the performance of the other requisite acts.

The naturalization laws have also made certain acts and conditions the equivalent of the formal declaration of intention otherwise required. Thus the declaration of a parent or the residence in this country during the last three years of minority is all that is required by those laws to enable the child of that parent or the minor resident thereafter to acquire full citizenship upon taking the final oaths.

The pre-emption law authorizes entry thereunder by citizens of the United States, or those who have "filed a declaration to become such as required by the naturalization laws." Surely, under this language, those charged with the administration of the pre-emption laws must accept as a satisfactory compliance with that law those acts, recognized by the naturalization laws as equivalent to the formal declaration of intention prescribed.

Had the pre-emption law extended its privileges only to citizens of the United States, and to those who had declared their intention to become citizens, it would have been much more restrictive than the naturalization laws. In the passage of the pre-emption law, I think it was the intention of Congress to put aliens, naturalized without previous filing of declaration, on the same footing as those who were naturalized after making such filing. There can be no reason for any distinction, and hence the pre-emption law provided, as I construe it, that a declaration of intention, under its provisions, should only be required in such cases as it was required by the naturalization laws.

This disposes of the first question in the case, and leaves for consideration the status of a minor child of an alien who declares his intention to become a citizen, but who does not secure citizenship during such child's minority.

In deciding the celebrated case of *Boyd v. Thayer*, in which the question of the citizenship of the governor of Nebraska was involved, the supreme court of the United States, in a decision reported in 143 U. S., 135, considered at great length the status of a child of an alien, who was brought to this country during his minority, and whose father declared his intention to become a citizen. The conclusion reached by the court was, that even if the father did not complete his naturalization before the son attained majority, the son did not lose the inchoate status which he had acquired through his father's declara-

tion of intention to become a citizen. In giving expression to this conclusion, the court, on page 178 of the decision, said:

Clearly, minors acquire an inchoate status by the declaration of intention on the part of their parents. If they attain their majority before the parent completes his naturalization, then they have an election to repudiate the status which they find impressed upon them, and determine that they will accept allegiance to some foreign potentate or power, rather than hold fast to the citizenship which the act of the parent has initiated for them.

This is an unequivocal declaration by the supreme court that "minors acquire an inchoate status by the declaration of intention on the part of their parents," and this "inchoate status" is all that is required to qualify one to settle, and file under the pre-emption law. The death of the father is not necessary to the acquisition of the status. It is acquired by the *declaration* of the father, and his subsequent death adds nothing to the *status*. To all intents and purposes, the declaration of the father is that of the minor child, and upon arriving at full age, such minors may elect to hold fast to the citizenship which the act of the parent has initiated for them, or repudiate the same, and accept allegiance to some foreign potentate or power.

In the case at bar, Miss Poggi decided to hold fast to the citizenship which the act of her parent had initiated for her, and to complete the same. At the time of securing her certificate of citizenship, she took an oath to support the Constitution of the United States of America, and absolutely and entirely renounced and abjured all allegiance and fidelity to every foreign prince, potentate, state or sovereignty whatever, and particularly to the king of Italy.

Under the decisions of the Department cited herein, had the father of Miss Poggi died after declaring his intentions to become a citizen, and before he secured citizenship, or she reached her majority, she would have been a qualified pre-emptor upon becoming of age, without any act on her part towards securing citizenship; and upon complying with the provisions of section 2167 of the Revised Statutes, and the pre-emption laws, would have been entitled to patent for the land for which she filed her declaratory statement.

Under the decision of the United States supreme court, also cited herein, it seems to me that her rights were the same under the declaration of intention on the part of her father, as they would have been had he died before she reached her majority. In other words, that the minor child of an alien, who has declared his intention to become a citizen, but who does not complete his naturalization before the child attains his majority, is in the same position as the minor child of an alien who declares his intention to become a citizen, and dies before he is actually naturalized. Section 2168 of the Revised Statutes, declares that "the widow and children of such alien shall be considered citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law."

My conclusion is, that Miss Poggi was a qualified pre-emptor at the

time she made settlement upon the land in question, and having become a citizen of the United States, will be entitled to a patent therefor, upon showing compliance with the law under which her declaratory statement was filed. The departmental decision of July 27, 1892, is hereby revoked and set aside, and the homestead entry of Merian will be canceled, upon a showing on the part of Miss Poggi, as above stated.

RAILROAD GRANT—SETTLEMENT RIGHT—WITHDRAWAL.

BURNAM *v.* NORTHERN PACIFIC R. R. CO.

A corroborated allegation that a tract is excepted from an indemnity withdrawal, by reason of a conflicting settlement right, may be accepted as conclusive as against the company without a hearing, in the absence of any showing to the contrary by the company.

Secretary Smith to the Commissioner of the General Land Office, December 19, 1893.

I have considered the motion filed on behalf of the Northern Pacific R. R. Co., for the review of departmental decision of November 19, 1888, reversing your office decision of October 18, 1883, which denied the right of Albert Burnam to make timber culture entry of the S $\frac{1}{2}$ SE $\frac{1}{4}$ and S $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 5, T. 15 N., R. 45 E., Spokane Falls land district, Washington, for conflict with the withdrawal made on account of the grant for said company.

This land is within the limits of the withdrawal upon the map of amended general route of said road filed February 21, 1872, but upon the definite location of the road (October 4, 1880), it fell within the indemnity limits, the order of withdrawal on account of which was made by your office letter of December 2, 1880, and the company selected it in its list of March 20, 1884.

On March 30, 1883, Burnam tendered a timber culture application for this land and accompanied it by affidavits tending to show that this land was settled upon by one Alex. Drescol in May 1877; that Drescol was duly qualified to settle on public lands and that he continued to claim and improve the land until on October 20, 1882, he sold his possessory right to Burnam, the present claimant.

It becomes necessary, therefore, to inquire into the status of the land at the date Burnam tendered his timber culture application therefor on March 30, 1883.

In the case of Cole against said company (17 L. D., 8), it was held that the withdrawal upon the map of amended general route was made without authority of law and was consequently no bar to settlement.

If the allegation of settlement by Drescol is true, it is unnecessary to consider the effect of the indemnity withdrawal as such settlement served to except the land from the withdrawal even if authorized, and

unless the company disputes the allegation there can be no reason to put the claim to the expense incident upon a hearing to sustain the same.

If the land was not withdrawn, then the application by Burnam was improperly rejected, and his appeal was a bar to the subsequent selection by the company.

You will, therefore, allow the company thirty days within which to file affidavits tending to disprove the allegations made in support of Burnam's application, and in the event of its failure to file such showing, Burnam's application will be allowed, if no other objection appears to the allowance of the same, and the company's selection will then be canceled, but if proper showing is made, a hearing will be ordered and the matter disposed of as in other cases made and provided by the rules of practice.

To this extent the previous decision is modified.

TIMBER CULTURE CONTEST—CONTESTANT.

QUIVEY *v.* MULLER.

An application to enter land embraced within the timber culture entry of another does not give the applicant the status of a contestant under section 3, act of June 14, 1878, in the absence of the prescribed notice to the record entryman of such application.

Secretary Smith to the Commissioner of the General Land Office, December 19, 1893.

Your office letter of June 5, 1893, transmitted a motion for review, on the part of plaintiff, filed in your office May 26, 1893, complaining of alleged errors of departmental decision of April 8, 1893, in the case William W. Quivey *v.* A. Oswald Muller (unreported), and involving timber culture entry for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 24, T. 26 N., R. 1 W., O'Neill, Nebraska, land district.

The main assignment of error is embodied in the first ground, as follows: "In treating our client as a mere protestant, with no interest in the case, and in finding that contestant has no application pending."

In support of his said motion, plaintiff produces the affidavits of the register and receiver who tried the case originally, each of whom testifies, substantially, that according to his memory, plaintiff filed in the local office, with his affidavit of contest, the usual application to enter the land in controversy as a homestead.

In the decision complained of, the following language occurs:

Treating the paper as a protest affidavit, I do not find that it has been sustained. The protestant can not complain of this, as he has no interest in the case. He has no application for entry and simply objects to the proof as offered.

If it be true that plaintiff had complied with the law, in filing his

application to enter the tract in controversy, he was entitled to any benefit inuring thereby to an applicant under the law.

The contention of plaintiff is, that his contest was not simply such a one as that contemplated by the act of May 14, 1880.

It was more. It was a contest under section 3 of the timber culture act of June 14, 1878. With his original contest affidavit, Quivey filed his homestead application for the land, which, either in transit to the General Land Office, or elsewhere, was lost.

It appears further, that defendant Muller offered his final proof on July 31, 1889, upon which there was a disagreement between the local officers—the receiver approving the same, but the register being of the opinion that the proof was prematurely offered.

The final proof was then forwarded to the General Land Office for instructions. While the final proof was thus in the hands of the Commissioner, Quivey's affidavit of protest was transmitted to the General Land Office, his application to enter being lost, "either in transit thereto, or elsewhere."

The Commissioner subsequently ordered a hearing, which was had. Pending the trial under that hearing, plaintiff discovered that there was no application to enter among the papers, and offered another application, which was received and filed by the officers over the objection of defendant.

Now, in order to determine whether plaintiff's status at the hearing was that of a protestant merely, or was that of a contestant under the 3d section of the act of 1878, it is necessary to notice the provisions of that act.

The 3d section of said act (20 Stat., 113), reads as follows:

That if at any time after the filing of said affidavit, and prior to the issuing of the patent for said land, the claimant shall fail to comply with any of the requirements of this act, then and in that event such land shall be subject to entry under the homestead laws, or by some other person under the provisions of this act: *Provided*, that the party making claim to said land, either as a homestead settler, or under this act, shall give, at the time of filing his application, such notice to the original claimant as shall be prescribed by the rules established by the Commissioner of the General Land Office; and the rights of the parties shall be determined as in other contested cases.

In the motion for review relied upon by plaintiff, it is not shown or contended that any notice was ever served upon defendant of his application to enter the land in controversy as has been prescribed by the rules established by the Commissioner of the General Land Office; nor does it appear that defendant waived such notice.

In view of this fact, the Department was correct in treating plaintiff as a mere protestant, and, in my opinion, its action should be sustained. (See 15 L. D., 23.)

The motion is therefore denied.

RAILROAD GRANT—INDIAN RESERVATION—OCCUPANCY.

ATLANTIC AND PACIFIC R. R. CO. *v.* TIERNAN.

Lands embraced within a reservation created for Indian purposes do not, under the grant of this company, occupy the status of lands granted subject to the right of Indian occupancy. Lands so reserved when the grant becomes effective are absolutely excepted therefrom, and when released from such reservation become a part of the public domain.

Secretary Smith to the Commissioner of the General Land Office, December 19, 1893.

I have considered the case of the Atlantic and Pacific Railroad Company *v.* Farral Tiernan, on appeal by the former from your decision of December 4, 1890, accepting the final proof of the latter for the fractional N. $\frac{1}{2}$, and SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of section 3, T. 17 N., R. 1 W., Prescott land district, Arizona.

This land lies within the primary limits of the grant to said railroad company by act of July 27, 1866 (14 Stat., 292). The act granted the odd numbered sections within twenty miles of the line of the road on each side, "whenever . . . the United States have full title not reserved, sold, granted, or otherwise appropriated" etc. The act provided that the line of the road should be designated by a plat thereof filed in the office of the Commissioner of the General Land Office. The map covering that portion of the line lying opposite the land in controversy was filed March 12, 1872. The withdrawal of the lands was ordered May 17, 1872; but it appears that on October 3, 1871, it was recommended that certain lands be set apart as an Indian reservation, known as the "Camp Verde Indian reservation," and the tracts in controversy were included therein. This recommendation was approved by the President of the United States November 9, 1871, and the land was from that time reserved for the use of the Indians, and so remained until April 23, 1875, when the President of the United States, by an executive order, revoked all former orders creating the said Indian reservation and restored the land therein to the public domain. The facts relative to the establishment of this reservation are fully set forth in the case of said company against L. A. Willard (17 L. D. 554).

On November 6, 1886, Tiernan made a pre-emption cash entry for the land in dispute, alleging residence since 1878, with improvements valued at \$1,000. The land was surveyed in 1883; the plat was filed May 24, 1884.

On December 4, 1890, the final proof of Tiernan came before your office for consideration, and the same was approved. Thereupon came the Atlantic and Pacific Railroad Company and appealed from said decision affirming the action of the local officers in accepting said proof.

It assigns four grounds of error:

1. In holding that the land was excepted from the grant by reason of its inclusion in the Camp Verde Indian Reservation.

2. In holding, impliedly, that said reservation was ever used for the purposes set forth in the executive order.

3. In not holding that said reservation only passed a temporary use, and that the grant attached subject to such use.

4. In holding that said reservation could affect the grant, it having been made after the passage of the act of Congress creating the grant.

As to all of which it may be said: First,—It is admitted that the land was in fact *reserved*. The act creating the grant excepted it therefrom; and, Second.—It is quite immaterial whether the land was in fact *used* for the purposes set forth in the order. The order was nevertheless effectual in creating the reservation. As to the third assignment that the reservation created only a use in the land, I do not consider it tenable.

The United States supreme court in case of *Buttz v. Northern Pacific Railroad Co.* (119 U. S., 55), distinguished between lands encumbered by Indian titles, and lands *reserved*. The former are spoken of as titles by occupancy, and the court speak of the Indians retiring from these lands “to the reservations set apart for them,” and say of this, “Their right of occupancy was in effect abandoned.”

After discussing the provisions of the act by which the government was to extinguish these titles as rapidly as might be consistent with public policy and the welfare of the Indians, and after referring to the large amount of land along the line of road “subject to this right of occupancy by the Indians,” the court say “with knowledge of their title and its impediment to the use of the lands by the company, Congress made the grant with a stipulation to extinguish the title. It would be a strange conclusion to hold that the failure of the United States to secure the extinguishment at the time when it should first become possible to identify the tracts granted, operated to recall the pledge and to defeat the grant,” and the court held that the fee by the terms of the grant passed to the company subject only to the condition that the title should be extinguished as rapidly as might be “consistent with public policy and the welfare of said Indians.” In the grant to the Atlantic and Pacific Company, the following words are added “and only by their voluntary cession.”

The wording of the act, the reasoning of the court and their conclusion all show clearly that lands occupied by Indian titles occupy a different status from lands *reserved* by act of Congress or executive order. It will not do to say that the statute does not apply to Indian reservations as to other reservations; the act makes no exception either by specifying certain reservations, or by inserting any exceptions, conditions or limitations as to Indian reservations, and while the statute remains as it does, to make an exception of these is to interpolate into the statute something which Congress did not insert in it. Congress had before it the problem of Indian *occupancy*. It treated that matter plainly and clearly, and if it had intended the company's grant to attach

to the fee, and the Indian *reservations* should be only a use or easement in the land terminable in the future, it could easily, and would certainly have said so. It did not so provide, and it is not within the province of the Department to change, modify or improve upon Congressional enactments. See *Dellone v. Northern Pacific Railroad Company*, 16 L. D., 229.

As to the fourth assignment it may be said that the company's rights did not attach to any tract of land upon the passage of this act of Congress, but upon filing a map of definite location, and when this was done the land to which its rights would otherwise have attached was *reserved*, and this being so no rights attached, and when the order was revoked, the land became a part of the public domain; for the reason that the company had no right to the land which the revocation could revive or give effect to.

Said decision is therefore affirmed.

RAILROAD GRANT—FINAL ADJUSTMENT.

ALABAMA AND FLORIDA R. R. CO.

The final adjustment of a railroad grant, prior to the act of March 3, 1887, and in accordance with existing departmental construction, will not be disturbed with a view to recovering title to lands that under later rulings should have been excluded from the grant.

Secretary Smith to the Commissioner of the General Land Office, December 26, 1893.

On February 26, 1890, you submitted for the consideration of the Department an adjustment of the grants made by the act of May 17, 1856 (11 Stat., 15), to the States of Alabama and Florida, to aid in the construction of railroads from Pensacola, Florida, to Montgomery, Alabama, showing that there was an excess in approvals made to that part of the grant conferred upon the Alabama and Florida Railroad Company, in the State of Florida, of 18,888.76 acres, and that said grant had never been formally adjusted.

Acting upon the statement of facts set forth in said communication, which showed that the erroneous certification did not arise from any decision of the land department as to the status of any particular tract, or upon any question involving the construction of the grant, but upon a pure mistake in certifying a greater quantity than the entire area of the grant, and that the grant had never been formally adjusted, my predecessor directed that you make a demand of the company for a reconveyance of the lands certified to it in excess of its grant.

I am now in receipt of your communication of July 29, 1890, in which you present a statement of facts appearing upon the records of

your office, which show that the certification of this excess was not an inadvertence, or mistake, but an error in the construction of the law in the light of recent decisions, and that this grant was formally adjusted in 1858, in accordance with the then existing construction of the act making the grant.

You state that the records and files of your office show that on September 8, 1857, the agent of the State of Florida submitted a list of selections to satisfy said grant, and on October 21, 1857, he was advised by your office that said list was found to contain several thousand acres in excess of the amount to which the company was entitled, and "that it would be necessary to exclude therefrom so many tracts as shall be necessary to reduce the total amount within the limits prescribed by the law making the grant."

On July 24, 1858, the opinion of the Department was requested as to whether indemnity was allowable for lands that had never belonged to the United States, and upon receiving a reply in the affirmative, the Commissioner, on August 27, 1858, submitted for approval a list of indemnity selections, with the following letter:

I have the honor to submit herewith for your approval a list embracing the lands selected by the State of Florida outside of the six and within the fifteen mile limits of the reserve to *satisfy* the grant to said State to aid in the construction of the Alabama and Florida Railroad by act of Congress, approved May 17, 1856.

This list was approved by the Secretary of the Interior, and on June 25, 1860, the Commissioner of the General Land Office, in accordance with directions from the Department, reported that "The adjustment of the Alabama and Florida road was completed and approved on the 28 of August, 1858."

From the foregoing facts appearing of record in your office, you conclude that "there can be no doubt but that the recommendation and approval of the list composing the indemnity lands to satisfy the grant was an adjudication of the matter and an adjustment of the grant," and that "from the fact that no further claim has been made under the grant shows that it was so treated by the company, and it was so pronounced in the Commissioner's letter of June 25, 1860, before referred to."

From the statement of facts now presented by your letter of July 29, 1890, I am satisfied that this grant has been formally adjusted, and is not controlled by the act of March 3, 1887, directing the Secretary to immediately adjust, in accordance with the decisions of the supreme court, all railroad land grants heretofore unadjusted. But the authority to recommend suits for the recovery of lands or of their money value is not derived solely from the second section of the act of March 3, 1887, because, as stated in the circular of instructions of November 22, 1887 (6 L. D., 276),—

The provision contained in this section confers no greater power upon the Secretary of the Interior than he possessed before the passage of that act, and which from time to time has been exercised by that official in recommending to the Attor-

ney-General that suits be brought to cancel patents appearing to have been erroneously certified or patented for the benefit of any railroad company.

The purpose of the act was to make that mandatory which before rested in the discretion of the Secretary in the exercise of his authority over the public lands.

And it will be seen by reference to my letter of July 12, 1890, that the order to make demand upon the company for reconveyance of the excess was not predicated solely upon the authority conferred by said act, for in that letter it was said:

You seem to entertain the opinion that on account of the lapse of time since approval of lands under the grant, it is doubtful if it can now be treated as unadjusted, with a view to recovery of the excess under the act of March 3, 1887, (24 Stat., 556). The power of the Secretary to recommend suits for the recovery of land erroneously certified or patented is not derived solely from the act of March 3, 1887, but suits may be brought for the recovery of such lands independently of that act.

* * * The erroneous certification in the case now under consideration did not arise from any decision of the Secretary or Land Office, as to the status of any particular tract, or upon any question involving the construction of the grant, but seems to have been a pure mistake in certifying a greater quantity than the entire area of the grant. If these lands have been sold to bona fide purchasers, who are citizens of the United States, they will be protected by the fourth section of the act of March 3, 1887; but a suit would still be required in order to fix the liability of the company for the purchase money of the land as fixed by said act.

It now appears from your letter of July 29, 1890, that the certification of said lands was not the result of pure mistake or inadvertence in certifying a greater quantity of lands than the entire area of the grant, but, as you maintain, the result of an error of judgment in the construction of the grant, in the light of recent decisions.

It appears that in the adjustment of the grant, submitted with your letter of February 26, 1890, a deduction of 11,242.28 acres of the 18,888.76 acres, alleged to be erroneously certified, was made on account of the conflict with the grant for the Pensacola and Georgia Railroad Company, made by the same act, which under the decision of the supreme court in the case of St. Paul and Sioux City Railroad Company v. Winona and St. Peter Railroad Company (112 U. S., 720), in the opinion of your office, reduced the grant to that extent; but you state that you are satisfied no such deduction was made on the adjustment of this grant in 1858, as, under the opinion of Secretary Thompson upon the question submitted in the letter of your office of July 24, 1858, a liberal construction of the statute in favor of the grantee company was directed, and indemnity was allowed for all losses. This view is sustained by the decision of Secretary Thompson upon the proper construction to be placed by the Department upon this grant, rendered November 7, 1857 (1 Lester, 526), in which he says that, "the definite location of the road will locate the grant upon the proper number of odd sections on each side with which the United States shall not previously have parted with the title," and that, "the law itself conjoins the location of the lands, within which the selection by each State must be made, to supply the quantity of the several grants that may be

found wanting, because the United States has heretofore parted with the land which would otherwise be granted."

This still leaves an excess of 7,646.48 acres in excess of the entire area of the grant, but I am informed that this excess is accounted for from the fact that there was certified to the road section for section, and that upon the adjustment of the grant, submitted with your letter of February 26, 1890, it appears that the acreage of the indemnity is in excess of the acreage of the odd sections lost within the granted limits, because the sections certified as indemnity average more than six hundred and forty acres to the section.

The adjustment of that portion of the road in the State of Alabama shows that the road has not received the full quantity of lands to which it was entitled, but a number of the tracts certified were covered by uncanceled and unexpired preemption filings, existing at date of definite location, and, acting under the information contained in your letter of February 26, 1890, that this grant was unadjusted, my predecessor deemed it his duty, under the rulings of the Department and the requirements of the act of March 3, 1887, to direct that a demand be made of the company for a reconveyance of the lands so erroneously certified. Being now satisfied that this grant has been adjusted, and that the certification of said lands, both for the grant in the State of Florida, as well as in the State of Alabama, was not an inadvertence or mistake, but was made in accordance with the construction of said grant as then held by the Department, and from the facts now submitted, this case is controlled by the decision of the Department of May 28, 1890 (10 L. D., 610), in the case of Hannibal and St. Joseph Railroad Company, and the decision of July 12, 1890, is recalled and revoked. You will therefore take no further action in this matter.

TAYLOR *v.* YATES ET AL.

Petition for re-review of departmental action heretofore taken denied by Secretary Smith, December 26, 1893.

ENTRY—APPLICATION—RAILROAD GRANT—INDEMNITY.

CLANCY ET AL. *v.* HASTINGS AND DAKOTA RY. CO.

An entry should not be allowed during the pendency on appeal of the application of another to enter the same tract.

The commutation of a homestead entry should not be allowed in the presence of an adverse claim pending on appeal and involving the validity of the original entry. Land embraced within a homestead entry, or an unexpired pre-emption filing, is excepted from indemnity withdrawal, or selection.

An indemnity selection made subsequent to the regulations of 1879, without a specification of loss, is no bar to the acquisition of rights initiated prior to such specification.

A selection made without specification of loss, and prior to the departmental requirement of such specification, is legally made; and the circular instructions of 1885 do not require a subsequent designation of loss to validate such a selection, though it can not be approved until a loss is duly specified.

Secretary Smith to the Commissioner of the General Land Office, December 26, 1893.

The tracts in question in this case—to wit: the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and lot 4 (fractional SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$), Sec. 5, T. 112 N., R. 34 W., Redwood Falls, Minnesota—are within the twenty mile indemnity limits of the grant for the benefit of the Hastings and Dakota Railroad Company, under the act of Congress approved July 4, 1866 (14 Stat., 87). Withdrawals on this line were made on August 8, 1866, and May 14, 1868, respectively.

On November 10, 1860, Louis Fleury filed a pre-emption declaratory statement on the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and lot 4 of Sec. 5, being a part of the land in question.

September 12, 1864, Thomas Smith made a homestead entry for lot 4 of the land in question and other lands. His entry was canceled May 1, 1867.

On September 26, 1864, Thomas Harney made homestead entry for all the tracts in question, except that tract described as lot No. 4. His entry was canceled on February 9, 1872.

On May 31, 1873, a list of selections on account of the railroad grant, embracing the tracts in question, was admitted.

From your letter of January 10, 1887, it appears that these same tracts, together with others, were again selected by the railroad company, on December 13, 1881.

On May 28, 1885, James Clancy made a homestead entry for the land in question.

Robert E. Simmons soon afterwards applied to enter under the homestead law the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and lot 4, in said section, township, and range, and Albert M. Simmons made a similar application to enter the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section. These applications were rejected by the register and receiver, on July 25, 1885, because the land was covered by Clancy's entry.

Applicants appealed from this ruling, alleging that Clancy's entry was illegal, because of non-contiguity of the land embraced therein.

On August 27, 1885, you considered these appeals and affirmed the action of the register and receiver in rejecting said applications. Thereupon an appeal was taken from your decision to this Department, where, on December 14, 1886, the papers relating to Clancy's entry and the cases of Albert M. and Robert E. Simmons were returned to you for further consideration, in view of the fact that the tracts in question are within the indemnity limits of the grant to the railroad company,

and the claims of said company to the land had not been adjudicated by your office.

On June 7, 1886, Clancy filed a relinquishment in the local land office of all his interest in and claim to the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and lot No. 4, and Michael J. Laughlin made a homestead entry thereon.

On September 17, 1888, Laughlin was allowed by the local land officers to commute his entry to cash, and on January 1, 1889, Clancy was permitted to commute his entry to cash.

It was, of course, irregular for the register and receiver to have allowed either the original or cash entry of Laughlin, since Simmons' application was made prior to said original entry, and was still pending when it was commuted to cash. It was also irregular for them to have allowed Clancy to commute his entry to cash, in the face of the adverse claim pending on appeal, against the validity of his original entry.

The pre-emption filing of Fleury, for the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and lot No. 4, made prior to the date of the withdrawals, being on unoffered land, and uncanceled at the dates of said withdrawals, excepted the tracts covered by it from the operation thereof.

The entry of Thomas Harney, for the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, being in existence and uncanceled upon the date of the respective withdrawals, excepted said land from the operations thereof.

The filing of Fleury and entry of Harney cover all the land in question. All of said tract was therefore taken out of the operation of said withdrawals. The pre-emption filing of Fleury, covering the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and lot No. 4, was made on November 10, 1860, and was for unoffered land; the pre-emption law then in force did not designate a time within which proof was required to be made, except that it was required to be made "at any time before the commencement of the public sale, which shall embrace the land claimed." (1 Lester, 374; 2 Lester, 241; *Malone v. Union Pacific Railway Company*, 7 L. D., 13.)

This was the condition of the pre-emption law, so far as is necessary to the determination of this case, at the time the filing in question was made.

On July 14, 1870, Congress passed an act (16 Stat., 279), requiring pre-emption claimants, of the class of the one in question, to make proof in one year from the date of the passage of the act, or before July 14, 1871. Afterwards, by joint resolution, dated March 3, 1871 (16 Stat., 601), the time within which proof was required to be made, was extended for one year, or until July 14, 1872.

On May 9, 1872, Congress passed an act for the protection of pre-emption claimants in the State of Minnesota and other States (17 Stat., 88), extending the time within which proof was required to be made for one year or until July 14, 1873.

The filing of Fleury had not expired on May 31, 1873, which was the

date when the tract was selected by the railroad company; hence, the tract embraced in said filings was not subject to selection, being pre-empted land, and no rights were secured to the company by said selection. *Hensley v. Missouri, Kansas, and Texas Railway Company*, 12 L. D., 19.

Prior to the circular of November 7, 1879, providing for the adjustment of railroad land grants, there was no requirement that in making indemnity selections a particular loss should be specified as a basis for such selection, but, in said circular it was held, based upon a misconstruction of the decision of the supreme court in the case of the *Leavenworth, Lawrence and Galveston Railroad Company v. United States* (2 Otto. 733), that,

In the adjustment of all grants it consequently becomes necessary to know for what lands lost *in place* the indemnity selections are made; and with the view to this end you will require the companies to designate the specific tracts for which the lands selected are claimed.

Neither the selection of 1873, nor that of 1881, was accompanied by a designation of losses as a basis therefor.

The selection of 1881, having been made under the regulations of 1879, in the absence of a specification of the losses on which the same is based, can not be recognized, nor is such selection any bar to the acquirement of rights initiated at any time prior to the filing of such specification of losses, which, under these regulations, is necessary to a completion of the selection. *St. Paul, Minneapolis, and Manitoba Ry Co., v. Hastings and Dakota Ry Co.*, 13 L. D., 440.

As to the tract embraced in the filing by Fleury, and now covered by the entry of Michael J. Laughlin, neither selection by the company reserved the land, and both selections to that extent are canceled.

On June 7, 1886, Clancy filed a relinquishment of all interest in the land covered by Laughlin's entry. This action on his part left the tract covered by his (Clancy's) entry contiguous.

Robert E. Simmons' application to enter the tract thus relinquished was pending at the date of the relinquishment. It follows that, the railroad selections being inoperative to reserve the land, his (Simmons') application, being prior to any other, should prevail.

Laughlin's entry must therefore be canceled, if, after due notice, Simmons completes his entry upon the application heretofore presented.

This leaves for consideration the question as to the effect of the selection of 1873, upon the tract now embraced in Clancy's entry.

There can be no question, but that the selection of 1873 was in all respects regular under the regulations governing the selection of indemnity lands in force at that time, and, hence, such selection is entitled to due consideration, unless there was no authority to permit the selection in the manner made, or the company has since been required to amend the same and failed to comply with such requirement.

The act of July 4, 1866 (14 Stat., 87), making the grant for this company, provides: "In case it shall appear that the United States have

... sold any section or any part thereof ... then it shall be the duty of the Secretary of the Interior to cause to be selected ... so much land ... as shall be equal to such lands as the United States have sold," etc.

It will be seen that said act makes it the duty of the Secretary of the Interior to cause the selection to be made—i. e., the selection is to be made under his direction and subject to his approval.

Under the act making the grant, there is no right of indemnity given, except in case of a loss within the place, or granted, limits, but the manner of ascertaining the loss is for the Secretary to decide, as any other question necessary to establish the validity of the selection.

Subsequent to the circular of 1879, to wit: May 28, 1883, the Secretary of the Interior (Mr. Teller) directed that the Northern Pacific Railroad Company be permitted to select indemnity lands without specifying losses as a basis therefor, as stated therein, "leaving the ascertainment of the lands lost in place to your office."

If the power then existed to dispense with the specification of losses, and I do not doubt it, it existed prior to 1879.

In the case of *Sawyer v. Northern Pacific Railroad Company* (12 L. D., 448), referring to a selection made under the order of May 28, 1883, it was held that "the selection having been made in conformity with the order dispensing with the necessity of specifying losses, tract for tract, it was legally made, and while it remained on the records of the office it imparted notice to all settlers and entrymen."

Having determined that there was authority to permit the selection in the manner made, it remains to consider whether any subsequent order relative to indemnity selections, requiring the specification of losses, invalidated selections theretofore made, or necessitated a designation to give validity to such selections.

The circular of August 4, 1885 (4 L. D., 90), directed the register and receiver

before admitting railroad indemnity selections in any case, you will require preliminary lists to be filed, specifying the particular deficiencies for which indemnity is claimed ... Where indemnity selections have heretofore been made without specification of losses, you will require the companies to designate the deficiencies for which such indemnity is to be applied, before further selections are allowed.

In the case of *Darland v. Northern Pacific Railroad Company* (12 L. D., 195), this circular is construed, and therein it is stated: "Where indemnity selections had theretofore been made, without specifying the particular losses, the company should be required to designate the particular deficiencies before allowing further selections."

In the case of *Sawyer v. Northern Pacific Railroad Company* (*supra*), it is held

the subsequent circular of Secretary Lamar, of August 4, 1885 (4 L. D., 90), requiring a basis of loss for such selection, was not designed to invalidate selections theretofore made, but required the company to designate the losses in lieu of which such selections had been made, and directed the district officers not to receive any further selections until such order had been complied with.

It will be seen that said circular did not invalidate selections made prior to 1879 without a designation of losses, but exacted of the companies that losses must be specified for such selections, and all others theretofore made, before further indemnity selections would be permitted. This is directory, and its enforcement is left to the local officers.

It can not therefore be held that said order required a specification of losses in support of selections made prior to 1879, in order to give validity to the same, and I think to disregard such selections would be purely arbitrary and unauthorized.

In the case of Northern Pacific Railroad Company *v.* John O. Miller (11 L. D., 428), it was held that "indemnity can only be selected in lieu of some section or part of section lost in place, and the basis for such selection must be specifically designated and shown to be excepted from the grant, before the right of indemnity can be exercised," but in the case of Darling *v.* Northern Pacific Railroad Company (*supra*), referring to the Miller case, it was stated: "the selection in that case was not protected by the order of May 28, 1883, for the reason that it had never been withdrawn, and was therefore not of the character of lands contemplated by said order."

In the Miller case the selection was made January 30, 1884, and not being protected by the circular of May 28, 1883, it came under the order of 1879.

In the case of the Southern Minnesota Railway Express Company (12 L. D., 518), it was held that indemnity railroad selection will not be *approved*, in the absence of due specification of the losses for which the indemnity is asked, and the list submitted was returned that the losses might be specified.

In the present case, the list is not here for approval, and, while I should refuse to approve this selection until a loss is specified, yet, for the reasons before stated, the selection was a bar to Clancy's entry, and the same must be accordingly be canceled, unless, after due notice, he elects to permit the same to stand subject to the approval of the company's selection. In this connection, I might add that the adjustment of this grant, submitted with your letter of July 22, 1890, for approval, shows that there is yet due on account of the grant 895,626.11 acres.

The application by Albert M. Simmons for the same land must also be rejected.

Your decision is, with the above modification, affirmed.

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